84-870

NO.

Office-Supreme Court, U.S.
FILED
NOV 30 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1984

LOUISIANA PUBLIC SERVICE COMMISSION, THOMAS E. POWELL, GEORGE J. ACKEL, ED KENNON, LOUIS LAMBERT AND JOHN F. SCHWEGMANN,

Appellants

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Appellee

On Appeal from the United States Court of Appeals for the Fifth Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. When the Federal Communications Commission issues a rulemaking order decreeing that certain FCC-prescribed accounting procedures preempt inconsistent practices of state agencies, does 47 U.S.C. §401(b) permit a private party to secure federal court enforcement of the order against a state agency that was not a party to the FCC proceeding and was not specifically ordered by the FCC to do anything?

2. When the FCC declares that state agencies must adopt certain accounting procedures for intrastate ratemaking, but asserts that its order does not inhibit other ratemaking decisions, may a federal court in a private party enforcement proceeding preclude a state agency from making a rate of return adjustment in setting rates for the company?

PARTIES IN THE COURT OF APPEALS

The parties in the court of appeals were South Central Bell Telephone Co., appellant, and the Louisiana Public Service Commission and its members, Thomas E. Powell, George J. Ackel, Ed Kennon, Louis Lambert and John F. Schwegmann (incorrectly referred to in the district court and court of appeals captions as "John G. Schwegmann, Jr"), appellees. The Federal Communications Commission appeared as *amicus curiae*.

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SUPREME COURT OF THE UNITED STATES

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LOUISIANA PUBLIC SERVICE COMMISSION, THOMAS E. POWELL, GEORGE J. ACKEL, ED KENNON, LOUIS LAMBERT AND JOHN F. SCHWEGMANN,

Appellants

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Appellee

On Appeal from the United States
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 744 F. 2d 1107 (5th Cir. 1984). It appears in the appendix commencing at page A-l. The opinion of the United States District Court for the Middle District of Louisiana, which is reprinted in the Appendix beginning at page A-36, is reported as *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 570 F. Supp. 227 (M.D. La. 1983). The opinion of the Federal Communications Commission that was enforced by the district court and the

court of appeals is reported as *Amend. of Part 31*, 92 F.C.C. 2d 864 (1983), and is reprinted in the Appendix beginning at page A-57.

JURISDICTION

1. This is a proceeding brought by South Central Bell Telephone Co. ("South Central Bell") against the Louisiana Public Service Commission ("Louisiana Commission") to enforce an Order of the Federal Communications Commission ("FCC") pursuant to Section 401(b) of the Communications Act. 47 U.S.C. § 401(b). The FCC decided that certain accounting and depreciation practices adopted by the FCC preempted inconsistent practices used for intrastate ratemaking. *Amend. of Part 31*, 92 F.C.C.2d 864 (1983) ("*Preemption Decision*"), App. at A-57. The Louisiana Commission did not adopt the FCC-prescribed methods, and South Central Bell brought an injunction suit to enforce the *Preemption Decision*. The United States District Court for the Middle District of Louisiana ordered the Louisiana Commission to use the FCC methods for intrastate ratemaking; in a subsequent proceeding, it enjoined the Louisiana Commission from adjusting the rate of return of South Central Bell and mandated a dollar-specific rate increase. The United States Court of Appeals for the Fifth Circuit affirmed. These decisions invalidate accounting and depreciation practices of the Louisiana Commission and at least three of its ratemaking orders: *Ex parte South Central Bell Telephone Co.*, Order No. U-15445 (La. Pub. Serv. Comm'n, 1983), App. at A-99; *Ex parte South Central Bell Telephone Co.*, Order No. U-15445-A (La. Pub. Serv. Comm'n, 1983), App. at A-102: General Order, *In re reaffirmation of the applicability of state regulatory principles* (La. Pub. Serv. Comm'n, 1981), App. at A-109. In a subsequent ratemaking order, the Louisiana Commission

was forced to allow $62.7 million in intrastate rates to avoid disobedience of the *Preemption Decision* and the enforcement order. *Ex parte South Central Bell Telephone Co.*, Order No. U-15955-A (La. Pub. Serv. Comm'n, 1984), App. at A-117.

2. The decision of the United States Court of Appeals for the Fifth Circuit was rendered October 11, 1984. A notice of appeal was filed on November 16, 1984. App. at A-97.

3. The Court has appellate jurisdiction over the decision of the court of appeals pursuant to 28 U.S.C. §1254(2), which permits appeals to this Court when state laws are invalidated as repugnant to the United States Constitution. The ruling enforces the *Preemption Decision*, thereby invalidating the Louisiana ratemaking orders as repugnant to the Constitution. Ratemaking orders of a legislative nature are state "statute(s)" for the purpose of 28 U.S.C. §1254(2), which provides for appeals to this Court. *E.g., Atchinson T. & S.F. Ry. Co. v. Public Utilities Commission of California*, 346 U.S. 346, 348 (1953); *Lake Erie & Western Railroad Co. v. State Public Utilities Commission of Illinois*, 249 U.S. 422, 424 (1919). Article 4, Section 21 of the Louisiana Constitution invests the Louisiana Commission with general regulatory authority over common carriers and public utilities. The ratemaking function of the Louisiana Commission is legislative. *E.g., Gulf States Utilities Co. v. Louisiana Public Service Comm'n*, 364 So.2d 1266, 1268 (La. 1978); *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 352 So.2d 964, 969 (La. 1977).

STATUTORY PROVISIONS

The following federal statutes, set forth in the Appendix commencing at Page A-136, are involved in this case:

47 U.S.C. §152(a)
47 U.S.C. §153(i)
47 U.S.C. §153(t)
47 U.S.C. §401(b)
47 U.S.C. §413
47 U.S.C. §416(a)

The following state ratemaking orders, set forth in the Appendix commencing at page A-99, are involved in this case:

Ex parte South Central Bell Telephone Co., Order No. U-15445 (La. Pub. Serv. Comm'n, 1983).

Ex parte South Central Bell Telephone Co., Order No. U-15445-A (La. Pub. Serv. Comm'n, 1983).

General Order, *In re reaffirmation of the applicability of state ratemaking principles* (La. Pub. Serv. Comm'n, 1981).

Ex parte South Central Bell Telephone Co., Order No. U-15955-A (La. Pub. Serv. Comm'n, 1984).

STATEMENT OF THE CASE

1. This is an injunction proceeding in which a federal court ordered the Louisiana Public Service Commission, a state agency with regulatory power over telephone carriers

and other utilities in Louisiana, to increase the intrastate telephone rates of South Central Bell Telephone Co. by more than $40 million. A preliminary injunction was issued by the United States District Court for the Middle District of Louisiana ("district court") to require the Louisiana Commission to "obey" a ruling of the Federal Communications Commission, which held that certain FCC-prescribed accounting practices preempted inconsistent state practices ("*Preemption Decision*"). The district court not only invalidated the accounting practices traditionally used by the Louisiana Commission, but overruled a rate of return determination made by the Louisiana Commission when it adopted the FCC accounting procedures. The Louisiana Commission appealed and the United States Court of Appeals for the Fifth Circuit ("court of appeals") affirmed.

2. In 1980, the FCC amended its accounting rules to give carriers the option of adopting two depreciation practices permitting faster capital recovery: the "equal life group" and "remaining life" methods. *Amend. of Part 31*, 83 F.C.C.2d 267 (1980) ("*Depreciation Order*"). In 1981, the FCC ruled that carriers should expense rather than capitalize their station connection costs. *Amend. of Part 31*, 85 F.C.C.2d 818 (1981) ("*Expensing Order*"). The FCC was requested to clarify that the *Expensing Order* did not limit the discretion of state agencies in fixing intrastate rates. In 1982, it ruled that "state commissions are not precluded from using their own accounting and depreciation procedures for intrastate ratemaking ...." *Amend. of Part 31*, 89 F.C.C.2d 1094, 1095 (1982). The FCC pointed out that state agencies had always been free to depart from FCC-prescribed procedures for intrastate ratemaking and that these departures received judicial approval. *Id.* at 1106-07. Thus, it held, a decision to preempt state practices would "repudiate nearly forty years of administrative

practice and applicable state court precedents ...." *Id.* at 1107.

The American Telephone & Telegraph Co. ("AT&T") sought reconsideration of the FCC decision and General Telephone Co. of Ohio petitioned for an order preempting depreciation practices of the Ohio Public Utilities Commission. On reconsideration the FCC decided that Section 220(b) of the Communications Act after all preempts state accounting practices that are inconsistent with the *Expensing Order* and *Depreciation Order*. It said: "We find that the most logical and reasonable interpretation of Section 220(b) of the Act is that where the Commission prescribes depreciation rates for classes of property, state commissions are precluded from departing from those rates." *Preemption Decision*, 92 F.C.C.2d at 879, App. at A-82. Alternatively, the FCC stated "that inconsistent depreciation rates will interfere with the efficient operation of the communications marketplace and thereby frustrate the achievement of the Commission's policies," and were therefore preempted. *Id.* at 880, App. at A-83.

The ordering clauses of the *Preemption Decision* 1) granted the petition for reconsideration of AT&T, 2) granted the petition for declaratory ruling of GTE of Ohio, 3) provided for publication of the *Preemption Decision* in the Federal Register, and 4) directed that the order be served on each state commission. *Id.*, App. at A-84. The *Preemption Decision* contained no ordering clause telling any state commission to do anything. *Id.*, App. at A-84. The Louisiana Commission was not a party to the proceeding before the FCC.

The Virginia State Corporation Commission sought review of the *Preemption Decision* in the United States

Court of Appeals for the Fourth Circuit. The Louisiana Commission intervened in the Fourth Circuit appeal after the injunction suit was filed in the district court to enforce the *Preemption Decision*. A number of state regulatory agencies, consumer counsel and other officials also intervened. By a 2-1 majority, the court of appeals affirmed the *Preemption Decision*, relying only on the asserted affirmative regulatory power of the FCC to preempt inconsistent state ratemaking practices. *Virginia State Corporation Comm'n v. Federal Communications Comm'n*, 737 F.2d 388, 392-96 (4th Cir. 1984). The Louisiana Commission has appealed the ruling of the Fourth Circuit.

3. As the FCC recognized in its initial decision, state agencies had always been free to follow their own practices for intrastate ratemaking. Judicial and administrative decisions unanimously held that the power reserved to the states in the Communications Act permitted state regulators to make their own ratemaking decisions. *E.g.*, *Pacific Telephone and Telegraph Co. v. Public Utilities Commission of California*, 401 P.2d 353, 372-73 (Cal. 1965); *In re Northwestern Bell Telephone Co.*, 43 N.W.2d 553, 557 (N.D. 1950); *Re Southern Bell Telephone and Telegraph Co.*, 66 PUR 3d 1, 58 (Fla. Pub. Serv. Comm'n, 1966); *Re New England Telephone & Telegraph Co.*, 35 PUR 3d 100, 104 (Vt. Pub. Serv. Comm'n, 1960). Moreover, the uniform accounting systems prescribed by federal agencies have never been viewed as binding for ratemaking, even on the prescribing agencies. *Alabama-Tennessee Natural Gas Co. v. Federal Power Comm'n*, 359 F.2d 318, 336 (5th Cir. 1966) ("The short answer is that accounting for tax purposes and even the Commission's Uniform System of Accounts may be valuable tools, but they cannot dictate ratemaking policies."); *American Telephone & Telegraph Co.*, 64 F.C.C.2d 1, 56-60, 62, 68 (1977); *see American Telephone &*

Telegraph Co. v. United States, 299 U.S. 232 (1936). Therefore, a number of state agencies declined to adopt the FCC-prescribed accounting practices for intrastate ratemaking.

Relying on the *Preemption Decision*, telephone companies across the nation brought injunction proceedings in federal courts to force their state regulators to grant higher rates. These actions were brought pursuant to Section 401(b) of the Communications Act, 47 U.S.C. §401(b), as suits "for the enforcement" of an FCC order against parties "in disobedience" of the order. In three suits that were largely paper proceedings conducted under restrictive time constraints, federal courts ruled that this section provided jurisdiction to federal courts in private party suits against the Washington, Maryland and Kansas commissions. *Pacific Northwest Bell Telephone Co. v. Washington Utilities and Transportation Comm'n*, 565 F.Supp. 17 (W.D. Wash. March 10, 1983), *appeal pend'g* No. 83-3746 (9th Cir.); *Chesapeake & Potomac Telephone Co. v. Public Service Commission of Maryland*, 560 F.Supp. 844 (D. Md. Apr. 7, 1983), *appeal pend'g* No. 83-1403 (4th Cir.); *Southwestern Bell Telephone Co. v. State Corporation Commission of Kansas*, No. 83-4090 (D. Kan. Apr. 8, 1983). Armed with these precedents, telephone companies obtained injunctions against the ratemaking agencies of Louisiana, Maine, Arkansas and Iowa. *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 570 F.Supp. 227 (M.D. La. 1983), *aff'd* 744 F.2d 1107 (5th Cir. 1984); *New England Telephone Co. v. Public Utilities Commission of Maine*, 570 F. Supp. 1558 (D. Me. 1983), *rev'd* 742 F.2d 1 (1st Cir. 1984); *Southwestern Bell Telephone Co. v. Arkansas Public Service Comm'n*, 738 F.2d 901 (8th Cir. 1984), *cert. pend'g*, No. 84-483 (U.S.); *Northwestern Bell Telephone Co. v. Iowa State Commerce Comm'n*, No.

83-688-A (S.D. Iowa 1984). An injunction was denied in Vermont and an injunction application is pending in Wisconsin. *New England Telephone & Telegraph Co. v. Public Service Board of Vermont*, 576 F.Supp. 490 (D. Vt. 1984), *appeal pend'g* No. 84-7051 (2d Cir.); *Wisconsin Bell, Inc. v. Public Service Commission of Wisconsin*, No. 84-C-0004 (D. Wisc.).

This spate of lawsuits marked the first time that 47 U.S.C. §401(b) was ever used by private parties against state public service commissions. Regulated utilities obtained federal court injunctions to force their state regulators to raise intrastate rates to comply with depreciation policies implemented by these companies pursuant to the permission of the FCC. In the case of the FCC-approved depreciation practices, the procedures for faster capital recovery were not even required by the FCC, but are utilized by carriers at their option. *Depreciation Order*, 83 F.C.C.2d 267 (1980). Thus, state regulators have been enjoined to raise rates to accommodate the choices made by regulated utilities.

The federal courts are divided concerning the propriety of allowing private party suits against state commissions pursuant to Section 401(b). As noted above, a number of district courts and the Fifth and Eighth Circuits have approved this action. The Eighth Circuit decision reversed a district court order that denied an injunction on the ground that the *Preemption Decision* was *ultra vires*. *Southwestern Bell Telephone Co. v. Arkansas Public Service Comm'n*, 584 F.Supp. 1087 (D. Ark.), *rev'd* 738 F.2d 901 (8th Cir. 1984), *cert. pend'g* No. 84-483 (U.S.). The First Circuit held that federal court enforcement of the *Preemption Decision* is improper because a rulemaking decision is not an "order" in the sense contemplated by Section

401(b). *New England Telephone and Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1 (1st Cir. 1984). The district court in Vermont ruled that a state commission is not a "person" against whom an FCC order can be enforced under the statute. *New England Telephone & Telegraph Co. v. Public Service Board of Vermont*, 576 F.Supp. 490 (D. Vt. 1984), *appeal pend'g* No. 84-7051 (2d Cir.).

4. This proceeding arose when the Louisiana Commission denied a request of South Central Bell for an intrastate rate increase. After making the appropriate ratemaking adjustments, the Louisiana Commission found that the revenues of South Central Bell were sufficient to produce the rate of return allowed in its previous rate case, and an increase was unnecessary. The Commission did not make a finding of the fair rate of return for the company. *Ex parte South Central Bell Telephone Co.*, Order No. U-15445 (La. Pub. Serv. Comm'n, 1983), App. at A-99.

South Central Bell did not appeal any aspect of the ratemaking order to the state courts. It filed an injunction suit in the district court, however, contending correctly that the Louisiana Commission had not adopted the accounting practices approved by the FCC. The district court refused to examine the propriety of the *Preemption Decision* and rejected the argument that the *Preemption Decision* could not be enforced pursuant to Section 401(b). The district court ordered the adoption of the FCC procedures, but refused to mandate a dollar-specific rate increase, stating that "[w]hile depreciation schedules are an important factor in rate making, they are only one factor among many ...." 570 F.Supp. at 234, App. at A-47. The district court required the Louisiana Commission "to set new rates within ten days utilizing F.C.C. policies and rates." *Id.*,

App. at A-47.

Because of the 10 day limitation, the Louisiana Commission was unable to order the preparation and filing of additional evidence or to conduct additional rate hearings. *Cf.* La. Pub. Serv. Comm'n. R.19 (10 day notice requirement for most cases). The case was reconsidered on the basis of the record originally compiled by the Louisiana Commission. The Louisiana Commission implemented the FCC accounting procedures and determined that these practices increased intrastate operating expenses by about $40.5 million. Because these changes apparently required a rate increase, the Louisiana Commission proceeded to examine the fair rate of return issue. It found that a rate of return on equity of 12 percent was sufficient. The Commission ordered a rate increase of $12.7 million to produce this rate of return, after allowing for the $40.5 million in increased expense. *Ex parte South Central Bell Telephone Co.*, Order No. U-15445-A (La. Pub. Serv. Comm'n, 1983), App. at A-102.

South Central Bell returned to the district court, requesting an injunction ordering a dollar-specific rate increase and, alternatively, a holding that the Commission was in contempt. The district court took no evidence in connection with this motion, but accepted memoranda and heard argument. South Cental Bell argued in its memorandum that the rate of return finding was "arbitrary and capricious," in violation of state ratemaking authorities. (R., Supp. Memo. in Support of Motion to Modify Order, etc. at 7-8). The company attempted to introduce evidence on the issue of motivation: a transcript assertedly prepared from a radio station recording of the Louisiana Commission meeting. The district court rejected this evidence, stating "you look at what they did as opposed to the

individual comments or motives, even, of the people who make up the quasi-legislative body...." (R., 7/29/83 at 45). South Central Bell was permitted to attach the transcript to a memorandum.

The *Preemption Decision* states that it "only prohibits the states from setting depreciation rates" that are inconsistent with FCC practices; it disclaims any intent to require the state commissions to accept particular tariffs. *Preemption Decision*, 92 F.C.C. 2d at 874, App. at A-74. In addition, the FCC was represented at the argument on the motion to modify the injunction; its deputy associate general counsel was questioned by the district court. When asked if the FCC was interested in an order mandating a specific increase, counsel stated:

> MR. INGLE: No, sir, we're not interested in the specific numbers. I think we would see an appropriate order in this case as one which enjoins the Louisiana Commission—perhaps, in some rather vague sense—to issue a rate order which, whatever else it does, follows and obeys the FCC's depreciation rules as established in the substantive orders that have preemptive effect as a result of the preemption order.
>
> (R., 7/29/83, at 40-41).

The district court ordered a specific rate increase of $40.5 million. It found that the Louisiana Commission was "arbitrary and capricious" in adjusting the rate of return, relying in part on the fact that no new evidence was received. 570 F. Supp. at 238, App. at A-55. The district court stated it would "not become involved in the rate making process and that intrastate rate making is still within the exclusive province of the states." 570 F. Supp. at 237, App.

at A-53. The district court overruled the ratemaking determination of the Louisiana Commission and ordered the increase "since this court will not engage in rate making ...." 570 F.Supp. at 238, App. at A-56.

The court of appeals affirmed. It rejected the argument that Section 401(b) does not authorize a private party injunction suit to enforce the *Preemption Decision* against a state commission, specifically refusing to follow the First Circuit decision in *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1 (1st Cir. 1984). The court of appeals also rejected the contention that the district court could not overrule the rate of return determination of the Louisiana Commission in enforcing the *Preemption Decision*.

On the rate of return issue, the court of appeals did not accept the district court's reasoning that the dollar-specific injunction did not involve ratemaking. 744 F. 2d at 1124, App. at A-32. Instead, it affirmed on the basis of two determinations it read into the district court's decision. First, it ruled that the district court "necessarily had to" interpret the *Preemption Decision* as precluding the Louisiana Commission from lowering the rate of return. *Id.* at 1122, App. at A-27. This interpretation was perceived in the district court opinion and adopted by the court of appeals, although the *Preemption Decision* states that it only applies to depreciation practices and counsel for the FCC had expressly declined to recommend that the rate of return determination be overruled. *See Preemption Decision*, 92 F.C.C.2d at 874, App. at A-74; (Tr., 7/29/83 at 40-41).

Second, the court of appeals found that the district court "necessarily had to" find that the Louisiana Commission adjusted the rate of return "other than for a valid

reason." 744 F.2d at 1122, App. at A-28. This determination of motivation was not made by the district court, which instead relied on an "arbitrary and capricious" standard in overturning the rate of return ruling. 570 F.Supp. at 238, App. at A-55. Indeed, the district court disclaimed any interest in the issue of motivation, rejecting the only evidence offered on the point. (Tr. 7/29/83 at 43-45).

The Louisiana Commission argued to the court of appeals that the $40.5 million increase in the cash flow of South Central Bell reduced the risk of the company, making a lower rate of return appropriate. The court of appeals relied on the perceived factual finding of ill motive and determined that the lessened risk was not the real reason for the rate of return adjustment. Since this asserted "finding" was not "clearly erroneous", the court of appeals upheld the rate of return decision of the district court. 744 F.2d at 1124.

THE QUESTIONS ARE SUBSTANTIAL

This case presents important issues relating to an unprecedented eruption of injunction suits brought by telephone companies against state public service commissions pursuant to 47 U.S.C. §401(b). This statute, which provides a means of enforcing orders of the FCC, was never intended to authorize suits against state agencies. The injunction suit in this case was not authorized because a state commission is not a "person" subject to the regulatory jurisdiction of the FCC and the *Preemption Decision* is not an "order" within the meaning of the statute. On these issues, conflicts exist in the decisions of the lower federal courts. In addition, the rate of return ruling of the district court was an unauthorized foray into intrastate ratemaking, beyond that necessary to enforce the

Preemption Decision. South Central Bell had a full and effective remedy in the state courts on both of these issues. Because the questions are substantial, the Court should give them plenary consideration.

A. *Section 401(b) Does not Authorize a Private Party Injunction Proceeding to Require a State Ratemaking Agency to Abide by the Preemption Decision.*

Federal courts generally do not have jurisdiction to review the constitutionality of state ratemaking orders; these cases are usually heard in state courts. In this case, however, the court of appeals held that jurisdiction existed pursuant to Section 401(b) to enforce the *Preemption Decision* against the Louisiana Commission. This ruling is erroneous. Section 401(b) was never intended to permit injunction suits by regulated utilities against state agencies to obtain higher rates. The express language of this provision permits enforcement only against those parties regulated by the FCC. Morever, even if a state agency could be a defendant in a suit under Section 401(b), the *Preemption Decision* is not the type of "order" that can be enforced pursuant to this provision. Therefore, the ruling of the court of appeals is erroneous.

As a matter of general policy, Congress has ordained that state ratemaking issues be kept out of federal courts. Thus, the Johnson Act, 28 U.S.C. §1342, precludes the federal courts from enjoining state ratemaking decisions when 1) jurisdiction is based on diversity or a claim that the rate order is unconstitutional; 2) the order does not interfere with interstate commerce; 3) the order was made after reasonable notice and a hearing; and 4) there is a plain and efficient state court remedy. This provision has

been construed repeatedly as intended to channel rate litigation into the state courts. *Gulf Water Benefaction Co. v. Public Utility Commission of Texas*, 674 F.2d 462 (5th Cir. 1982); *Tennyson v. Gas Service Co.*, 506 F.2d 1135 (10th Cir. 1974). Even when the Johnson Act is technically not applicable, the policy against federal court interference in intrastate ratemaking may require federal abstention when there is an adequate state court remedy. *Alabama Public Service Comm'n v. Southern Railway Co.*, 341 U.S. 341 (1951).

South Central Bell had a plain, speedy and effective avenue to obtain state court review of the ratemaking order of the Louisiana Commission. La. Const. Art. IV, §21(D); La. R.S. 45:1192. The Louisiana courts could have considered the preemption issue along with any other argument raised by South Central Bell; these courts would have had jurisdiction over the rate of return issue that ultimately arose. Typically, the preemptive effect of federal agency orders has been determined in the ratemaking context by the state courts. The *Narragansett* doctrine, the preemption doctrine under which state ratemaking agencies must accept certain operating costs of utilities when they have already been approved in a rate case by the Federal Energy Regulatory Commission, is a state court doctrine. *E.g.*, *Narragansett Electric Co. v. Burke*, 381 A.2d 1358 (R.I. 1977); *United Gas Corp. v. Mississippi Public Service Comm'n*, 127 So.2d 404 (Miss. 1961).

While South Central Bell and other telephone companies could litigate the effect of the *Preemption Decision* in the state courts, they would not have had a forum in which the courts deemed themselves powerless to decide its validity. The Louisiana Commission and other state agencies would have been able to argue that the *Pre-*

emption Decision is *ultra vires.* The state courts could have determined, on the merits, whether Section 220(b) of the Communications Act or the *Preemption Decision* itself preempts state ratemaking policies that are inconsistent with accounting practices prescribed by the FCC, giving the state agencies the benefit of a full hearing.

Instead of seeking relief in the state courts, South Central Bell and other telephone companies chose to use Section 401(b), characterizing their injunction suits as enforcement proceedings. The outbreak of lawsuits in the federal courts marked the first time that this provision has been used against state commissions. This use of Section 401(b) for the enforcement of the *Preemption Decision* was improper.

First, Section 401(b) does not apply to state commissions. It provides:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money ... any party injured hereby ... may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of same, the court shall enforce obedience to such order ....

This provision does not apply to state commissions. The word "person" is defined in Section 3(b) of the Communications Act as "an individual, partnership, association, joint-stock company, trust, or corporation"; "state commission" is defined in a separate paragraph. 47 U.S.C. §153(i), (t), App. at A-136. Moreover, Section 2 of the Act, which determines its reach, makes clear that the statute applies to

"persons" who *are carriers*. It states in part: "The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio ... and to all persons engaged within the United States in such communication ...." 47 U.S.C. §152(a), App. at A-136. A split of authority exists in the lower courts on the issue of whether Section 401(b) applies to state commissions. *See New England Telephone & Telegraph Co. v. Public Service Board of Vermont*, 576 F.Supp. 490 (D. Vt. 1984), *appeal pend'g* No. 84-7051 (2d Cir.).

Other provisions in the Communications Act establish that Congress did not intend to authorize a rash of suits against state commissions to raise the intrastate rates of telephone companies, in which federal courts enforce an FCC order while proclaiming themselves powerless to examine its validity. The Communications Act instead provides for cooperation between the FCC and state agencies, including the formation of joint boards to deal with matters of mutual concern. *E.g.* 47 U.S.C. §410. Moreover, the Communications Act provides for personal service of orders of the FCC on carriers; it makes no provisions for service on state commissions. 47 U.S.C. §§413, 416(a). In this case, a general administrative mailing was deemed the due service required by Section 401(b). 744 F. 2d at 1121, App. at A-26.

Second, the *Preemption Decision* is not an "order" enforceable pursuant to Section 401(b). The *Preemption Decision* was adopted in a rulemaking proceeding in which the Louisiana Commission was not a party. *Preemption Decision*, 92 F.C.C. 2d 864 (1983), App. at A-57. The ruling is legislative in nature, setting forth a rule of general applicability. This type of "order," in contrast to an adjudicative order, is not a proper basis for an "enforcement"

proceeding. Instead, the preemptive effect of the *Preemption Decision* should be litigated in state courts. On this point, there is a conflict in the decisions in the circuits. *Compare* the decision of the court of appeals, 744 F.2d at 1117-20, App. at A-17—A-23, *with New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 4-9 (1st Cir. 1984).

The *Preemption Decision* is also not enforceable because it is general and declaratory in nature. The ruling does not direct the Louisiana Commission or any other state commission to do anything. The *Preemption Decision* is analogous to a case in which a court expresses a view as to the rule of law on a given issue. The decision theoretically would be binding as a rule of law on everyone in the jurisdiction, but enforcement proceedings could be brought only against a party in the case who violated a specific order of the court. Similarly, FCC orders should be enforceable only against parties or persons specifically ordered to take a prescribed action.

The interpretation given Section 401(b) by the court of appeals raises important questions. The spectre of an eruption of federal court injuction suits brought by private parties against state officials to increase intrastate rates creates significant federal-state tensions. This strain is increased when the federal courts enforce an order against agencies that were not parties to the proceeding in which the order was issued, and the courts refuse to examine the substantive validity of the order. Congress did not intend that Section 401(b) be used against state commissions, especially when the complaining parties have effective state court remedies. The Court should give these issues plenary consideration.

B. *The Dollar-Specific Rate Injunction, Overruling the Rate of Return Decision of the Louisiana Commission, Was Beyond the Authority of the District Court Under Section 401(b).*

Two orders were issued by the district court. The first required compliance with the depreciation practices prescribed by the FCC; the Louisiana Commission complied in full with this injunction by recognizing $40.5 million in additional intrastate expense. 570 F.Supp. at 235, App. at A-54; *Ex parte South Central Bell Telephone Co.*, Order No. U-15445-A (La. Pub. Serv. Comm'n., 1983), App. at A-102. When the Louisiana Commission adjusted the rate of return and granted a rate increase of $12.7 million, the district court overruled this action as arbitrary and capricious and required adherence to a previously-authorized rate of return. 570 F.Supp. at 237-38, App. at A-55—A-56. Even if Section 401(b) permits the enforcement of the *Preemption Decision*, this second ruling exceeds the scope of the *Preemption Decision* and is unauthorized by Section 401(b).

Section 401(b) does not permit the federal courts to review ratemaking decisions that are beyond the scope of the FCC order being enforced. This section only allows the "enforcement of such order." Since the FCC twice disclaimed interest in any issue other than its accounting practices, it was improper to overrule the rate of return determination.

The FCC avoided the argument that the *Preemption Decision* constitutes intrastate ratemaking by stating that its ruling "only resolves a single issue impacting the ratemaking process." *Preemption Decision*, 92 F.C.C.2d at

874, App. at A-74. The FCC indicated that its order "only prohibits the states from setting depreciation rates for telephone property inconsistent from those prescribed by the FCC. It does not require that any particular tariff for intrastate service be accepted by the state commissions." *Id.*, at A-74. Counsel for the FCC expressly disclaimed interest in a dollar-specific injunction in argument to the district court. (Tr., 7/29/83, 40-41). The FCC never suggested that the *Preemption Decision* could bind a state commission to a previously authorized rate of return.

The strained reading of the district court's opinion by the court of appeals does not justify the rate of return injunction. In fathoming a district court interpretation that the *Preemption Decision* precludes ratemaking adustments that offset increased depreciation expense, the court of appeals not only misstated the reasoning of the district court, but ran afoul of one fear expressed by the First Circuit in declining to approve Section 401(b) enforcement: that placing interpretive power in the hands of private parties and some 700 federal district judges" could be troublesome. *New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, 742 F.2d 1, 6 (1st Cir. 1984). The interpretation of the court of appeals conflicts with the FCC interpretation of its own ruling, as expressed in the *Preemption Decision*, and the statements of counsel for the FCC.

In discerning a "finding of fact" that the ruling of the Louisiana Commission was ill-motivated, the court of appeals ignored the district court's statement that motivation was irrelevant; it also sidestepped the absence of an evidentiary hearing on the point. (Tr., 7/29/84 at 45), 744 F.2d at 1124 n.27 (relying on attachments to briefs, although the key attachment was excluded from evidence).

In any event, the court of appeals' preoccupation with motivation violates the rule that courts should examine the *result* in agency rulings, not the motivations of the decision makers. Because the issue arose in an "enforcement" proceeding, the Louisiana Commission was not even given the the benefit of this rule, which is universally followed in the federal system in suits to review agency decisions. *E.g., In Re Permian Basin Area Rate* Cases, 390 U.S. 747, 775 (1968); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).

The decision of the Louisiana Commission was justified. The huge increase in the cash flow of South Central Bell substantially reduced its risk; the $40.5 million in advanced capital recovery was nearly sufficient to pay all the interest charges on the intrastate debt of the company. The reduction in risk permitted a lower rate of return. The relationship of capital recovery and risk was recently recognized by the Maine Public Utilities Commission, which lowered the rate of return after being ordered to recognize the FCC-prescribed depreciation. It held that "no change can be made to depreciation without a reappraisal of the return on equity as well." *New England Telephone and Telegraph Co.*, Docket No. 82-124 (Maine Pub. Util. Comm'n, 1983).

The Louisiana Commission did not receive *new* evidence in the 10 day period allowed for compliance with the district court's injunction, but it had before it the entire record in the rate case. The rate of return decision could not be evaluated without analyzing this evidence, yet the district court found the Louisiana Commission "arbitrary and capricious" without even looking at the record.

The proper forum for review of the rate of return decision was the state court, where the result could be evaluated in the light of all the evidence. The injunction proceeding in this case, with its short deadlines and the court of appeals' preoccupation with motivation, did not permit a thorough and objective analysis of the result. The *Preemption Decision* did not require the state commissions to freeze previously allowed rates of return. Therefore, the rate of return injunction was not authorized by Section 401(b).

CONCLUSION

Every aspect of this case strains federal-state relations. Section 401(b) was used by the telephone company against its state regulators in a manner unauthorized by the statute and never contemplated by Congress. The Louisiana Commission was enjoined to raise intrastate rates on the basis of a rulemaking decision issued in a proceeding in which the state agency did not participate, without an opportunity in the enforcement proceeding to litigate the merits of the decision. The Louisiana Commission was also prevented from adjusting the intrastate rate of return of the telephone company, although the FCC ruling being enforced disclaims any intention to preclude this kind of adjustment. The outbreak of injunction suits brought pursuant to Section 401(b) has produced con-

flicting decisions in the lower courts. The Court should give these issues plenary consideration.

Respectfully Submitted,

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Office-Supreme Court, U.S.
FILED
JAN 9 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-870

In the
Supreme Court of the United States

OCTOBER TERM, 1984

LOUISIANA PUBLIC SERVICE COMMISSION, THOMAS E. POWELL, GEORGE J. ACKEL, ED KENNON, LOUIS LAMBERT AND JOHN F. SCHWEGMANN,

Appellants

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Appellee

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION OF APPELLEE SOUTH CENTRAL BELL TELEPHONE COMPANY TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Can a private party secure an injunction from a federal court pursuant to 47 U.S.C. §401(b) enjoining a state utilities commission to obey a presumptively valid order of the Federal Communications Commission?

2. When a state utilities commission fails to obey an injunction issued pursuant to 47 U.S.C. §401(b), can a federal district court modify its injunction so as to require the state utilities commission to allow the recovery of the level of increased expenses which the state utilities commission itself established as having resulted from application of the presumptively valid Federal Communications Commission Order?

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No. 84-870

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LOUISIANA PUBLIC SERVICE COMMISSION,
THOMAS E. POWELL, GEORGE J. ACKEL,
ED KENNON, LOUIS LAMBERT AND
JOHN F. SCHWEGMANN,

Appellants

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Appellee

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION OF APPELLEE SOUTH CENTRAL BELL TELEPHONE COMPANY TO DISMISS OR AFFIRM

The Appellee, South Central Bell Telephone Company,[1] respectfully moves to dismiss or affirm the

[1] At the time this action was filed, South Central Bell Telephone Company was a subsidiary of American Telephone & Telegraph Company ("AT&T"). On January 1, 1984, AT&T divested itself of its regional operating companies and South Central Bell Telephone Company became a subsidiary of BellSouth Corporation. Its sister subsidiaries are BellSouth Services, BellSouth Advertising & Publishing Company, BellSouth Mobility, Southern Bell, BellSouth Advanced Systems, Inc., BellSouth Enterprises and Sunlink, Inc.

judgment of the United States Court of Appeals for the Fifth Circuit in this case. Rule 16.1(a), (c) and (d).

INTRODUCTION

This case represents an appeal from a preliminary injunction which was awarded by a Federal District Court to enforce an order of the Federal Communications Commission (hereinafter "FCC") which preempted state ratemaking authority with respect to certain depreciation practices and methodologies. That Preemption Order is also being appealed by the Louisiana Public Service Commission (hereinafter "LPSC"), appellant herein, in a separate proceeding before the Court after having been affirmed by the Fourth Circuit. *Louisiana Pub. Ser. Com'n v. F.C.C.*, Docket No. 84-871, 1984 Term (U.S.).

For the purpose of this case, the lower courts were required by statute to presume that the Preemption Order was valid. 47 U.S.C. §402; 28 U.S.C. §2342(1). Indeed, South Central Bell Telephone Company (hereinafter "South Central Bell") readily admits that the injunction issued in its favor is totally dependent upon the validity of the Preemption Order. Therefore, this Court should postpone any consideration of this action until after such time as it has reached a decision in Docket No. 84-871. Such a postponement is particularly appropriate in the light of the circumstances underlying this case.

This appeal reaches this Court only because of the LPSC's decision to employ self-help. At the time the Preemption Order was issued, the LPSC had the option to appeal that Order to a Circuit Court of Appeals. Indeed, the LPSC eventually intervened in an appeal of the Preemption Order which was taken by the Virginia State

Corporation Commission to the Fourth Circuit Court of Appeals but did not seek a stay of the Preemption Order as it could have done pursuant to 28 U.S.C. §2349(2). Instead, rather than follow the proper procedure of obeying the Preemption Order while challenging its validity through the correct judicial channels, the LPSC instead chose to envoke the doctrine of nullification by disregarding a valid federal law through a claim of sovereign independence.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FEDERAL ORDERS INVOLVED

In addition to the FCC order set forth at pages A-57 through A-93 of the Appendix to the Jurisdictional Statement in this case, the following FCC Order, set out in the Appendix hereto, is also involved in this case.

In the Matter of The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended for:...South Central Bell Telephone Company..., 92 F.C.C. 2d 693 (1982).

FEDERAL STATUTES AND FEDERAL REGULATIONS INVOLVED

The following federal statutes and federal regulations, set forth in the Appendix commencing at Page B-50, are involved in this case:

5 U.S.C. §552(a)(1)
28 U.S.C. §1254(2)
28 U.S.C. §2342
28 U.S.C. §2344
47 U.S.C. §401
47 U.S.C. §402(a)
49 U.S.C. §16(12)
47 C.F.R. §0.455(a-e)

STATEMENT OF THE CASE

This is an appeal of a preliminary injunction which required the LPSC to comply with a presumptively valid FCC order preempting state ratemaking authority with respect to the depreciation of certain telephone plant and equipment.

A. *Factual Background*

In approximately 1973 the FCC began to study the depreciation of telephone plant and equipment. In 1980 it adopted the "remaining-life" and "straight-line equal life group" (SLELG) depreciation methods. Docket No. 20,188, 83 F.C.C. 2d 267 (1980), *on reconsideration*, 87 F.C.C. 2d 916 (1981). In reaction to the increased activity of the FCC injecting competition into the telephone industry and its related modification of depreciation and accounting practices, the LPSC issued its General Order of June 30, 1981, entitled *Reaffirmation of the Applicability of State*

Regulatory Principles to telephone terminal equipment and telephone accounting practices. Appendix to Jurisdictional Statement, pp. A-109 through A-116. Therein the LPSC stated:

> In order to place the FCC and South Central Bell Telephone Co. on notice of the regulatory policy of this State as it relates to the policies announced by the FCC, this Commission hereby orders:
>
> (1) The marketing of terminal equipment by communications common carriers will continue to be the subject of rate regulation by this Commission, even after March 1, 1982. This order will apply to any attempt of the Bell System to market this equipment through a separate subsidiary.
>
> (2) Depreciation rates for imbedded terminal equipment, and all other equipment historically regulated in the intrastate jurisdiction, will be set according to policies approved in this State. They will not be established to further a policy of "deregulation" of the FCC.
>
> (3) Changes in accounting procedures proposed by common carriers will be examined for their consistency with the approved regulatory practice of this State and will be approved or disapproved on this basis, and this basis only.
>
> The staff, special counsel and consultants of the Commission are instructed to take the necessary actions to ensure the implementation of this Order. The Order does not reflect any change in the regulatory policy of this Commission. However, it is necessary in light of the policies announced by the FCC.

Id. at A-15.

On May 3, 1982, South Central Bell filed tariff revisions with the LPSC seeking an increase in intrastate rates. As partial justification for the increased revenues, South Central Bell relied upon the FCC's adoption of remaining life and SLELG depreciation methods in 1980 and the FCC's ruling in 1981 requiring the expensing of station connections (Docket No. 79-105, 85 F.C.C. 2d 818 (1981), *on reconsideration,* 89 F.C.C. 2d 1094 (1982)).

During 1982 the FCC continued its review of the depreciation methods to be applied to the telephone plant and equipment of the various regional telephone companies. On August 13, 1982, the staff sent review letters to the regional Bell Telephone Companies and the respective state commissions outlining the FCC's recommendations for the implementation of SLELG rates. The LPSC received such a letter, and responded by asserting that it had not authorized South Central Bell to use the SLELG method for intrastate ratemaking purposes. *See, In the Matter of The Prescription of Revised Percentages of Depreciation,* Docket No. 83-576, 92 F.C.C. 2d 693 (1982), Appendix p. B-1.

On December 22, 1982, the FCC adopted the two orders which South Central Bell sought to enforce in this proceeding. The first of those was *In the Matter of Amendment of Part 31, Uniform System of Accounts,* Docket No. 79-105, 92 F.C.C. 2d 864 (1982); Appendix to Jurisdictional Statement, p. A-57 (hereinafter the "Preemption Order"). Therein, addressing directly the question of whether depreciation methodologies and practices should preempt state ratemaking authority in that area, the FCC stated, "Thus, we find it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communications Act and are

accordingly void." Appendix to Jurisdictional Statement, p. A-82. The FCC went on to state:

> We note that petitioner and the parties supporting the petition cite several states that have indicated that they do not intend to follow the Commission's depreciation prescriptions or expensing of inside wiring, or have refused to follow either. In light of the concerns expressed about an efficiently functioning market, we must find that inconsistent depreciation rates prescribed by state commissions will interfere with the efficient operation of the communications marketplace and thereby frustrate the achievement of the Commission's policies. Accordingly, we find that this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rates.

Id. at A-83. The Preemption Order concluded by directing that the Secretary of the FCC cause it to be published in the *Federal Register* and also cause a copy to be served on each state commission.

The second order adopted by the FCC on December 22, 1982, was *The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended,* Docket No. 82-576, 92 F.C.C. 2d 693 (1982); Appendix p. B-1 (hereinafter the "Prescription Order"). Therein, the FCC prescribed revised depreciation rates for eleven Bell Operating Telephone Companies, including South Central Bell, using the SLELG method. Appendix p. B-2. Noting the comments received from the LPSC and other state commissions, the FCC stated:

> Several state commissions stated that they have not approved the SLELG procedures for their jurisdictions. The presence or absence of state commission approval of SLELG rates does not control the prescription of SLELG rates in this order. The prescription of depreciation rates is plainly a matter within the Commission's jurisdiction under Section 220(b) of the Communications Act. We have today ruled that such depreciation orders are binding at both the federal and state levels. [Cite to Preemption Order omitted.]

Id. at p. B-12.

The Prescription Order was not appealed by the LPSC and is therefore final. 570 F.Supp. at 230, Appendix to Jurisdictional Statement at A-37.

On or about January 7, 1983, the FCC mailed copies of its Preemption Order to the LPSC. *See* Declaration of William J. Tricarico, Record pp. 103-104 and Appendix p. B-21, Affidavit of Lewis S. Quinn, Record pp. 134-136 and Appendix pp. B-22 through B-24. On January 19, 1983, the Preemption Order was published in the *Federal Register.*

In order to ensure that the LPSC had actual notice of the Preemption Order, on January 17 or 18, 1983, South Central Bell introduced a certified copy of it into the record compiled before the LPSC during its hearings concerning South Central Bell's proposed rate revisions. Transcript of June 3, 1983 hearing below, p. 78 and Appendix p. B-20.

On May 19, 1983, the LPSC denied South Central Bell's request for a rate increase, thereby refusing to implement the FCC-mandated depreciation methods and prescribed depreciation rates. Jurisdictional Statement, pp. A-99

through A-101; *Ex parte South Central Bell Telephone Co.*, Order No. U-15445 (La. Pub. Serv. Comm'n 1983), Record at pp. 48-80, Appendix to Jurisdictional Statement at A-99 through A-101.

B. *Proceedings Below*

Shortly after the LPSC denied South Central Bell's request for a rate increase, suit was filed in the Middle District of Louisiana seeking a preliminary and permanent injunction requiring the LPSC to implement the depreciation methodologies and expensing of station connections mandated by the FCC in the Preemption Order and the Prescription Order. Following a hearing, the district court found that it had jurisdiction under 47 U.S.C. §401(b) and that the prerequisites of that provision had been met. However, rather than issue a dollar-specific injunction, the court ordered the LPSC to comply generally with the Preemption Order and to set new rates within ten days. *South Central Bell Tel. Co. v. Louisiana Public Service Com'n.*, 570 F.Supp. 227, 232-34 (M.D. La. 1983); Appendix to Jurisdictional Statement, p. A-47.

On July 7, 1983, the Louisiana Commission, pursuant to the preliminary injunction, issued an order setting new rates. During the time between its initial order denying South Central Bell any increased rates and the July 7 order, no new evidence was received by the LPSC. In the July 7 order, the LPSC found that application of the FCC-prescribed accounting methods resulted in an increased expense level of $40,506,000. However, the LPSC ordered a reduction in the rate of return from 13.5% to 12%, and then found that an increase in revenue of only $12,700,000 was needed to meet those increased costs. Appendix to Jurisdictional Statement, pp. A-102 through A-108.

South Central Bell immediately returned to the District Court seeking to modify the preliminary injunction or, alternatively, to have the LPSC held in contempt. The District Court, stressing the fact that the LPSC had acted in an arbitrary and capricious manner by engaging in "a simple exercise in arithmetic designed to minimize the increase in telephone rates", concluded that it had no alternative but to accept the LPSC's finding that South Central Bell had increased expenses of $40,506,000 and to require the LPSC to increase rates sufficiently to cover that amount. 570 F.Supp. at 237-38; Appendix to Jurisdictional Statement, p. A-55.

On appeal, the Fifth Circuit held that South Central Bell was entitled to enforce the Preemption Order under 47 U.S.C. §401(b), and further found that the trial court had not erred in modifying its injunction. *South Cent. Bell Tel. v. La. Pub. Serv. Com'n*, 744 F.2d 1107 (5th Cir. 1984). The Fifth Circuit's decision was rendered on October 11, 1984. The LPSC filed its Notice of Appeal on November 16, 1984. Its jurisdictional statement was received by South Central Bell on November 29, 1984.

SCOPE OF REVIEW

Overriding all other aspects of this case is the fact that the merits of the Preemption Order which South Central Bell seeks to enforce are not before the Court in this proceeding. Indeed, as was recognized by both the district and circuit courts below, federal statutes specifically preclude review of the merits of the Preemption Order in this case. 47 U.S.C. §402; 28 U.S.C. §2342(1); *accord, F.C.C. v. ITT World Communications, Inc.*, __ U.S. __, 104 S.Ct. 1936, 1939 (1984). Therefore, in considering the findings of the lower courts, it must be presumed that the Preemption Order is valid.

This Court's review of the proceedings below is further restricted by the statute under which the LPSC has chosen to pursue its appeal, 28 U.S.C. §1254(2). This Court has previously emphasized that statutes authorizing appeals are to be strictly construed. *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1, 91 S.Ct. 156, 157 n.1 (1970). Under the express terms of §1254(2), the Court of Appeal's decision must be based squarely on a finding that a state statute relied upon by the LPSC is contrary to federal law, and this Court's review is restricted to the federal questions presented by that holding. *Public Service Comm. of Indiana v. Batesville Tel. Co.*, 284 U.S. 6, 52 S.Ct. 1 (1931).

Finally, as with all appeals of interlocutory decisions, this Court's review of the lower court's decision should be limited to the question of whether the court abused its discretion. *United States v. Corrick*, 298 U.S. 435, 56 S.Ct. 829 (1936); *Brown v Chote*, 411 U.S. 452, 93 S.Ct. 1732 (1973); *Detroit Football Company v. Robinson*, 283 F.2d 657 (5th Cir. 1960); *Barnwell Drilling Co. v. Sun Oil Company*, 300 F.2d 298 (5th Cir. 1962); *J. M. Fields of Anderson, Inc. v. Kroger Co.*, 310 F.2d 562 (5th Cir. 1962). Additionally, in reviewing an order enforcing an injunction great deference is due the interpretation placed on the terms of the injunctive order by the court which issued and must enforce it. *Alabama Nursing Home Ass'n. v. Harris*, 617 F.2d 385, 388 (5th Cir. 1980).

MOTION TO DISMISS

South Central Bell hereby moves to dismiss the appeal on the ground that it is not within this Court's jurisdiction because it was not taken in conformity with 28 U.S.C. §1254(2). Since no "State statute" was held invalid by the Court of Appeals, the LPSC cannot pursue an

appeal under that statute. Secondly, this court should dismiss the appeal because the decision below does not constitute a final decision which is appealable under 28 U.S.C. §1254(2). Finally, this appeal should be dismissed because it is apparent that the decision below was correct, and that the questions on which the decision of the case depend are so unsubstantial as to not need further argument.

A. *No "State statute" was held invalid*

Before jurisdiction can be found under 28 U.S.C. §1254(2), it must be established that the decision of the Court of Appeals was based squarely on a finding that a state statute relied upon by the appellant is contrary to federal law. This Court has consistently distinguished between those cases in which a state statute is expressly struck down on constitutional grounds and those in which an exercise of authority under state law is invalidated without reference to the state statute. While the former come within the scope of §1254(2)'s jurisdictional grant, the latter do not. *Silkwood v. Kerr-McGee Corp.*, __ U.S.__, 104 S.Ct. 615, 621 (1984); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 42-43, 103 S.Ct. 948, 953 (1983); *Hanson v. Denckla*, 357 U.S. 235, 244, 78 S.Ct. 1228, 1234 (1958); *Wilson v. Cook*, 327 U.S. 474, 482, 66 S.Ct. 663, 667 (1946). The injunction issued below did not, and could not, affect any "State statute". Rather, it merely operated to enjoin certain conduct by the LPSC and its individual Commissioners. An injunction decree operates *in personam. See, e.g., Suntex Dairy v. Bergland*, 591 F.2d 1063, 1068 (5th Cir. 1979).

Because the court below did not mention any "State statute", the parties did not contest or defend the constitutionality of any statute in their appellate briefs, and the

lower court's orders only dealt with courses of conduct rather than statutes authorizing that conduct, the present appeal is not within this Court's §1254(2) appellate jurisdiction. *Silkwood*, __ U.S. at __, 104 S.Ct. at 620-21; *Wilson v. Cook*, 327 U.S. at 481-82, 66 S.Ct. at 667; *Bradford Electric Light Co. v. Clapper*, 284 U.S. 221, 221-23, 52 S.Ct. 118, 118-19 (1931); *United States v. Arlington*, 669 F.2d 925 (4th Cir.), *appeal dismissed and cert. denied*, 459 U.S. 801, 103 S.Ct. 23 (1982).

Since no "State statute" was held invalid, this appeal should be dismissed for want of jurisdiction.

B. *A preliminary injunction cannot be appealed under 28 U.S.C. §1254(2)*

This Court has previously held that an appeal lies only from a final judgment or decree in cases where the validity of a state statute is drawn into question on the ground of repugnance to the Constitution, treaties or laws of the United States, and the decision is against its validity. *Slaker v. O'Connor*, 278 U.S. 188, 189-90, 49 S.Ct. 158, 159 (1929); *South Carolina Electric & Gas Co. v. Flemming*, 351 U.S. 901, 76 S.Ct. 692 (1956). Although arguments have been made that the requirement of finality is erroneous and should be overruled, *Chicago v. Atchison, T. & S. F. Ry. Co.*, 357 U.S. 77, 82-83, 78 S.Ct. 1063, 1066-67 (1958) and *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927, 95 S.Ct. 2561, 2565-66 (1975), that position has never been adopted and the finality requirement still exists.

The propriety of such a requirement is illustrated by the appeal presented herein. As South Central Bell noted in its introduction, the basis for its injunction lies in the validity of the Preemption Order. The merits of that Order

cannot be reviewed in this action, and have been appealed to this Court by the LPSC in a separate proceeding. It therefore follows that a final decision can be rendered in this action only after the validity of the Preemption Order has been determined. Until such time, any appeal of this action should be dismissed.

MOTION TO AFFIRM

Alternatively, South Central Bell moves to affirm the judgment of the Fifth Circuit that a private party can obtain an injunction under 47 U.S.C. §401(b) and that the district court did not abuse its discretion in modifying its injunction so as to require the LPSC to allow the recovery of the amount of increased expenses which were determined by the LPSC itself. Additionally, it is manifest that the questions presented by the LPSC in its appeal are so unsubstantial as to not need further argument.

A. *47 U.S.C. §401(b) provides an express remedy to private parties against state public service commissions*

In its Jurisdictional Statement, the LPSC raises a variety of reasons why it believes a private party cannot obtain an injunction under §401(b) against a state public service commission. The first two of these, the Johnson Act, 28 U.S.C. §1342, and the doctrine of comity, can be summarily dismissed. As was held by the courts below, the Johnson Act is inapplicable because jurisdiction herein is based upon a specific federal statute rather than an alleged repugnance of the defendant's action to the Constitution. 744 F.2d at 1123, Appendix to Jurisdictional Statement, p. A-33; 570 F.Supp. at 234, Appendix to Jurisdictional Statement, pp. 45-46. Furthermore, this case is not an appropriate one for abstention pursuant to the doctrine of

comity. *Aluminum Co. of America v. Utilities Comm'n*, 713 F.2d 1024, 1030 (4th Cir. 1983), *cert. denied*, __ U.S. __, 104 S.Ct. 1326 (1984); *Baggett v. Department of Professional Regulation*, 717 F.2d 521, 524 (11th Cir. 1983); *International Brotherhood of Electrical Workers v. Public Service Comm'n*, 614 F.2d 206, 212 n.1 (9th Cir. 1980).

The LPSC next argues that South Central Bell should not be permitted a private action under §401(b) because it could have litigated the preemption issue in state court. This argument is refuted by the express language of §401(b) itself. Pursuance of an administrative or state remedy is not a condition precedent to an action under that statute.

Next the LPSC argues that it is not a "person" which was "duly served" with an "Order". This contention is without merit because South Central Bell's suit named as defendants not only the LPSC but also the individual officials comprising the LPSC. *Accord, Chesapeake and Potomac Tel. Co. v. Pub. Serv. Com'n of Md.*, No. 83-1403 (4th Cir. Nov. 20, 1984), Appendix p. B-25. Moreover, the LPSC is not the first defendant to assert that a state public service commission is not a "person" under §401(b). However, a careful analysis of the Communications Act of 1934 reveals this argument to be without merit. Initially, it should be noted that the definitions of "person" and "State Commission" are inclusive rather than exclusive. The introductory language of 47 U.S.C. §153 states that the definitions therein are provided "For the purpose of this chapter, unless the context otherwise requires—." Appendix to Jurisdictional Statement, p. A-136. Accordingly, the definition of "person" must be construed in light of the circumstances in which it is utilized. This requires that, because the term is being used in connection

with §401(b), it be construed in light of that section.

The term "any person" is incorporated in §401(b) in conjunction with the provision of an express remedy to injured parties whereby they might enforce valid FCC orders. It should be noted that §401(b) is the only section allowing for the enforcement of an FCC order, since §§401(a) and (c) are directed to the prosecution of violations of *provisions* of the Communications Act by the FCC. Congress could hardly have intended that state commissions be immune to enforcement of FCC orders merely on the grounds that they were not "persons" within the meaning of the only section permitting enforcement of those orders. *Accord, Chesapeake & Potomac Tel. Co. v. Pub. Serv. Com'n, supra; Pac. N. W. Bell Tel. v. Wash. Util. & Transp. Com'n,* 565 F.Supp. 17, 20-21 (W.D. Wash. 1983), *appeal docketed,* No. 83-3746 (9th Cir. April 7, 1984); *Mountain States Tel. & Tel. Co. v. Dept. of Pub. Serv.,* 588 F.Supp. 5, 7 (D. Mon. 1983); *New England Tel. & Tel. Co. v. Public Util. Comm. of Maine,* 570 F.Supp. 1558, 1568 (D. Me. 1983), *rev'd on other grounds,* 742 F.2d 1 (1st Cir. 1984), *petition for cert. pending,* No. 84-900 (U.S.); *Wisconsin Bell, Inc. v. Public Service Comm'n of Wisconsin,* Civil Action No. 84-C-4 (E.D. Wis. November 13, 1984), Appendix p. B-40; *contra, New England Tel. & Tel. v. Pub. Ser. Bd. of Vt.,* 576 F.Supp. 490, 494-95 (D. Vt. 1983).

The LPSC next implies that the Preemption Order was not duly served upon it. However, no court which has been asked to enforce the Preemption Order has agreed with this argument. The majority of courts have enforced the Preemption Order, with several specifically examining the "duly served" requirement. *Wisconsin Bell, Inc. v. Public Service Comm'n of Wisconsin, supra,* Appendix at B-40; *Southwestern Bell Telephone Company v. State*

Corp. Comm'n of Kansas, No. 83-4090 (D. Kan. April 8, 1983), Appendix at B-36. Those courts which have refused to enforce the Preemption Order have done so on grounds other than a finding that it was not "duly served." *New England Tel. & Tel. v. Pub. Ser. Bd. of Vt., supra; New England Tel. & Tel. v. Public Utilities, supra; Cincinnati Bell Tel. Co. v. Pub. Utilities Com'n of Ohio*, 12 Ohio St. 3d 280, 466 N.E. 2d 848 (1984), *appeal pending*, Docket No. A-70, 1984 Term (U.S.).

As held by the Fifth Circuit below, the majority of courts have found that requirement of "due service" is met if the defendant in a §401(b) proceeding received notice legally sufficient to make the order enforceable. 744 F.2d at 1119, Appendix to Jurisdictional Statement at A-24 through A-25. The LPSC received notice in four separate ways: (1) it was a party to the proceedings which resulted in the Prescription Order, which itself incorporated the Preemption Order; (2) it received a copy of the Preemption Order by mail from the FCC (*see* Declaration of William J. Tricarico, record at pp. 103-104 and Appendix at p. B-21 and Affidavit of Lewis S. Quinn, Record pp. 134-136 and Appendix p. B-22); (3) a certified copy of the Preemption Order was filed into the LPSC's record of the hearings on South Central Bell's application for tariff revisions (*see* transcript of the June 3, 1983 hearing below, p. 78, Appendix p. B-20); and (4) a copy of the Preemption Order was published in the *Federal Register* on January 19, 1983. Under the Administrative Procedure Act, a rule is enforceable once it is published in the *Federal Register*. 5 U.S.C. §552(a)(1). Furthermore, the regulations of the FCC specifically provide that an order may be relied upon, used or cited as precedent once it has been published in the *Federal Register* or the person against whom it is used has actual knowledge of the order. 47 C.F.R. §0.455(e).

Therefore, the Preemption Order was "duly served" upon the LPSC.

As the final portion of its attack upon South Central Bell's invocation of §401(b), the LPSC asserts that the Preemption Order is not an "order" within the meaning of §401(b). This argument is based upon the one federal decision which so holds, *New England Tel. & Tel. Co. v. Public Utilities Com'n of Maine,* 742 F.2d 1 (1st Cir. 1984), *petition for cert. pending,* No. 84-900 (U.S.). However, this conclusion is contrary to those of all other federal courts which have considered this matter. Indeed, the only court to which the FCC Prescription Order was appealed subsequently reviewed on appeal a suit to enforce the Preemption Order and concluded that it was an "order" within the meaning of §401(b). *Chesapeake and Potomac Tel. Co. v. Pub. Serv. Com'n of Md.* at Appendix pp. B-29 through B-30; *accord, South Central Bell Tel. v. Louisiana Pub. Serv. Com'n,* 744 F.2d at 1115-19, Appendix to Jurisdictional Statement at A-14 through A-23; *Pac. N.W. Bell Tel. v. Wash. Util. & Transp. Com'n,* 565 F.Supp. at 21; *Southwestern Bell Telephone v. Ark. Pub. Serv.,* 738 F.2d 901, 908 (8th Cir. 1984), *petition for cert. pending,* No. 84-483 (U.S.). As a review of the Preemption Order itself reveals, there can be no doubt that the FCC ordered all state public utility commissions to follow the prescribed depreciation methodologies and procedures. *See also, Union Springs Tel. v. Ala. Pub. Serv. Com'n,* 437 So.2d 485, 488-90 (Ala. 1983); *Re N.Y. Tel. Co. v. Pub. Serv. Com'n of N.Y.,* 98 A.D. 2d 535 (N.Y. App. Div. 1984); *Re Application of Northwestern Bell Tel. Co.,* 218 Neb. 563 (1984). Moreover, at least two decisions of this Court provide support for interpreting the term "order" in §401(b) to include administrative rules. *See Ambassador, Inc. v. United States,* 325 U.S. 317, 65 S.Ct. 1151 (1945) and *Columbia*

Broadcasting System, Inc. v. United States, 316 U.S. 407, 62 S.Ct. 1194 (1942). Therefore, the Preemption Order was an "order" within the meaning of §401(b).

The LPSC's assertion that §401(b) does not provide a remedy to a private party against a state public utilities commission also runs contrary to §401(b) jurisprudence unrelated to the Preemption Order. For example, in *Illinois Bell Telephone Co. v. Ill. Commerce Com'n*, 740 F.2d 566 (7th Cir. 1984), the petitioner was granted an injunction against the defendant public utilities commission requiring it to comply with FCC-mandated accounting practices.

It is also instructive to compare §401(b) with its predecessor provision, 49 U.S.C. §16(12) (reproduced at Appendix p. B-54).[2] Section 16(12) expressly restricts the injunctions which it authorizes to those against carriers. While the LPSC argues that §401(b) should be construed so as to provide a similar result, it is conspicuous that §401(b) is not restricted in its scope to actions against carriers, as is its predecessor statute, §16(12). Indeed, it can be implied that Congress intentionally expanded the class of defendants against whom injunctions could issue under §401(b). Nothing in the language of §401 indicates that a private party is precluded from obtaining an injuncction under subsection (b) once the statutory prerequisites have been satisfied. Because the statutory language and clear weight of authority indicate that such a remedy is expressly provided, no substantial question exists which merits the argument of this case before the Court.

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[2] When the Communications Act was drafted, 49 U.S.C. §16(12) was the provision on which §401(b) was modeled. *See* S. Rep. No. 781, 73d Cong., 2d Sess. 9 (1934) and H.R. Rep. No. 1850, 73d Cong., 2d Sess. 7 (1934).

B. *The district court below did not abuse its discretion in granting and subsequently modifying the preliminary injunction*

The second major portion of the LPSC's Jurisdictional Statement argues that the district court exceeded its authority by issuing and later modifying the preliminary injunction. As discussed above, South Central Bell clearly established that the requirements of §401(b) had been met, *i.e.*, that (1) the Preemption Order is an FCC "order" within the meaning of §401(b), (2) the Preemption Order was regularly made and duly served upon the LPSC, (3) the LPSC was in disobedience of the order, and (4) South Central Bell had been injured by the LPSC's disobedience. 744 F.2d at 1114-1120, Appendix to Jurisdictional Statement, pp. A-13 through A-26. As was recognized by both courts below, when an injunction is expressly authorized by statute and the statutory conditions are satisfied, the injunction shall issue. *United States v. City and County of San Francisco*, 310 U.S. 16, 30-31, 60 S.Ct. 749, 757 (1940); *Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266, 273-74, 46 S.Ct. 263, 264-65 (1926); *Matter of Chicago, Milwaukee, St. Paul & P. R. Co.*, 738 F.2d 209, 212-213 (7th Cir. 1984); *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 868-69 (9th Cir.), *cert. denied*, __ U.S. __, 104 S.Ct. 149 (1983); *Atchison, T. & S. F. Ry. Co. v. Lennan*, 640 F.2d 255, 259-60 (10th Cir. 1981). Accordingly, the district court did not abuse its discretion in issuing the preliminary injunction requiring the LPSC to implement the FCC-mandated depreciation policies and procedures once it found that the §401(b) prerequisites had been met.

The LPSC next argues that the district court exceeded its authority by modifying its preliminary injunction so as to require it to allow South Central Bell to recover the

$40,506,000 in increased expenses which the LPSC itself found to result from implementation of the FCC-mandated procedures and methodologies. Both the district and circuit courts found as a matter of fact that the LPSC had acted arbitrarily and capriciously by reducing South Central Bell's fair rate of return from 13.5% to 12% for the sole purpose of appearing to recognize South Central Bell's increased expenses without having to order a corresponding increase in rates. 744 F.2d at 1120-22, Appendix to Jurisdictional Statement at A-27 to A-30; 570 F.Supp. at 237-238, Appendix to Jurisdictional Statement at A-53 to A-56.

The district court noted that the LPSC, in its order issued in response to the preliminary injunction on July 7, 1983, expressly found that the amount of increased expenses resulting from compliance with the Preemption Order was $40,506,000. 570 F.Supp. at 237-238, Appendix to Jurisdictional Statement at A-54 to A-56; *see also*, Appendix to Jurisdictional Statement pp. A-102 through A-107. The district court consistently refused to engage in the setting of rates within the intrastate jurisdiction. However, noting that no evidence had been received by the LPSC since the issuance of the preliminary injunction, the court found that the LPSC had no justification for failing to order an increase in revenues sufficient to match the increased operating costs resulting from compliance with the Preemption Order. 570 F.Supp. at 237, Appendix to Jurisdictional Statement at A-55. Therefore, in order to enforce compliance with the Preemption Order and with the terms of its preliminary injunction, the court modified that injunction so as to require the LPSC to permit South Central Bell to recover the $40,506,000 in increased expenses calculated by the LPSC.

There is no doubt that a district court has continuing jurisdiction over its preliminary injunction. *Canal Authority of State of Florida v. Callaway,* 489 F.2d 567, 578 (5th Cir. 1974). Great deference is given to the interpretation placed on the terms of an injunctive order by the district court which issued and must enforce it. *Alabama Nursing Home Ass'n v. Harris,* 617 F.2d 385, 388 (5th Cir. 1980), *citing Sierra Club v. Callaway,* 499 F.2d 982, 991 (5th Cir. 1974). As stated previously in the discussion of the scope of review, a preliminary injunction is reviewable only for an abuse of discretion by the trial court. In light of the circumstances under which the LPSC refused to permit the recovery of all the expenses resulting from compliance with the Preemption Order, the trial court was well within its discretion to modify the preliminary injunction as it did.

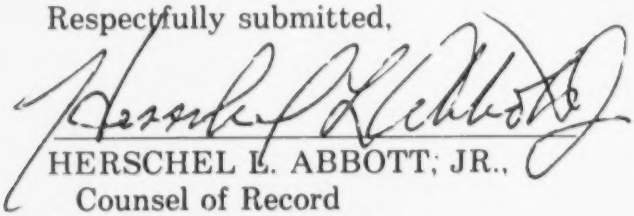
On appeal, the Fifth Circuit affirmed the modification of the preliminary injunction on grounds other than those relied upon by the district court. Specifically, the Fifth Circuit noted that the Communications Act imposed no restrictions upon the Court's authority to enforce an FCC order. The Court of Appeals found it clear that the trial court's power to enjoin was co-extensive with the reach of the FCC order being enforced. Since the validity of the Preemption Order was presumed on this appeal, and since the injunction was found necessary to the enforcement of that Order, the Fifth Circuit affirmed the modification of the injunction as it had already concluded that the LPSC violated the Preemption Order "by manipulating the rate of return for the sole purpose of avoiding high telephone rates." 744 F.2d at 1122-23, Appendix to Jurisdictional Statement at A-32 through A-33. This conclusion comports with the broad injunctive powers held by a court when enforcing preemptive statutes and orders. *Capital Service v. National Labor Relations Board,* 347

U.S. 501, 504, 74 S.Ct. 699, 702 (1954); *Public Utilities Com. v. United Fuel Gas Co.*, 317 U.S. 456, 468, 63 S.Ct. 369, 376 (1943); *Cabot Corporation v. Public Service Com'n of W. Va.*, 332 F.Supp. 370, 373 (S.D. W. Va. 1971).

CONCLUSION

For the reasons stated herein, this appeal should be dismissed or, in the alternative, affirmed.

Respectfully submitted,



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APPENDIX "A"

FEDERAL COMMUNICATIONS COMMISSION ORDER

FCC 82-576
32528

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended for:

American Telephone and Telegraph Company, Long Lines Department; The Chesapeake and Potomac Telephone Company; The Chesapeake and Potomac Telephone Company of Maryland; The Chesapeake and Potomac Telephone Company of Virginia; The Chesapeake and Potomac Telephone Company of W. Virginia; Illinois Bell Telephone Company; Indiana Bell Telephone Company, Incorporated; South Central Bell Telephone Company; Southern Bell Telephone and Telegraph Company; The Southern New England Telephone Company; Wisconsin Telephone Company

ORDER

Adopted December 22, 1982; Released December 30, 1982 by the Commission:

I. INTRODUCTION

1. Section 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §220(b), states that the Commission shall, as soon as practicable, prescribe classes of property for which depreciation charges may be included in operating expenses and the percentages of depreciation which shall be charged to each of the classes. It also states that the Commission may, when it deems necessary, modify the classes and percentages so prescribed.

2. By this order we prescribe revised percentages of depreciation (depreciation rates) for the eleven Bell Operating Telephone Companies (BOTC's) listed above using the straight-line equal life group (SLELG) method.

II. BACKGROUND

A. *Straight Line Equal Life Group Method*

3. In FCC Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration*, 87 FCC 2d 916 (1981), we amended our rules to permit the use of the SLELG depreciation method for new additions to plant as an alternative to the straight line vintage group (SLVG) method, provided that adequate data is available for the proper application of the method.

4. The primary differences between the SLELG and SLVG methods lie in the definition of the basic depreciation groups and in the approach each takes in spreading the original cost of assets comprising the basic groups over their estimated average service lives. While SLVG forms its basic groups by combining all units placed in one year (i.e., a vintage group), SLELG creates its basic groups by combining all units within each vintage group which share

an equal life expectancy (i.e., an equal life group). While the SLVG method is designed to depreciate 100% of the original cost of a vintage on average over the life cycle of each vintage, the SLELG method is designed to depreciate 100% of the original cost of each plant unit over its life. As a consequence, if projections are accurate, the SLELG method should allow for depreciation at a rate more representative of the actual consumption of units of property than SLVG. We concluded in Docket No. 20188 that the proper application and monitoring of this method would not only enhance the carriers' cash flow and present to all interested parties a more accurate and objective financial picture of the carriers' operations and capital requirements, but would also benefit their customers by encouraging innovation and the introduction of new technology.

5. Under both the SLVG and SLELG methods, retirement projections, service life estimates, and depreciation rates are normally determined, in part, through the use of survivor curves. These survivor curves define the relationship between the age of plant investment and the relative percentage expected to remain in service. Under the SLELG methodology, the survivor curves assume an added significance—that of defining the basic (equal life) groups. Under the SLVG method, most survivor curves have been selected only after the staff has completed detailed statistical analysis of historical retirement data. With the added significance of the survivor curves in the SLELG method, the availability and analysis of historical retirement data becomes even more important.

6. We recognized the importance of adequate data in Docket No. 20188 where we found that the SLELG method is acceptable, provided that:

> "... it is assured that adequate data is available for proper application of the method; that record keeping and reporting practices will enable monitoring of the reasonableness of the rate of allocation of both original cost and provisions for salvage and removal; that such allocation of original cost will achieve allocation over the service life of the property neither more nor less than 100% of the investment net of salvage value."

Accordingly, we directed the staff to take such measures as may be necessary to insure the measurability and accountability of the results under the SLELG method.

7. We further directed the staff to phase in the implementation of SLELG depreciation rates beginning with the outside plant accounts, followed by the central office equipment accounts and concluding with all other plant accounts. In accordance with this directive, this year the staff reviewed SLELG rates for the outside plant accounts for all of the BOTC's. As a result of that review, we adopted SLELG rates for new additions to most of the outside plant accounts for fifteen of these companies in July (*see* FCC 82-353, 90 FCC 2d 964 (1982)) and for nine additional companies in December (*see* FCC 82-542, Mimeo No. 32468). Our findings and conclusions regarding the SLELG rates for AT&T Long Lines' outside plant accounts are discussed below (see paragraph 26 ff). With the adoption of this order, the prescription of SLELG rates for the outside plant accounts is complete for the Bell System.

8. This year the staff also reviewed SLELG rates for the central office equipment accounts for most of the BOTC's. As a result of that review, we adopted SLELG rates for new additions to most of the central office equipment accounts for nine of these companies in December

(*see* FCC 82-542, Mimeo No. 32468). Our findings and conclusions regarding the SLELG rates for ten of the eleven BOTC's listed in the caption of this proceeding are discussed below (see paragraph 26 ff).[1] With the adoption of this order, the prescription of SLELG rates for the central office equipment accounts is complete for the BOTC's which have requested such rates.

B. *Review Procedures*

9. Since the late 1940's, the Commission has reviewed and prescribed the depreciation rates of approximately one-third of the larger FCC-subject telephone companies each year. In most cases we have prescribed rates for a carrier only after the following actions have been completed:

(1) Submittal of depreciation studies by the carrier.

(2) Staff review of the carrier's filings and studies in support of its proposed life and salvage factors.

(3) Independent staff analysis of such information as the carrier's plant mortality data and equipment retirement plans.

(4) Preparation of preliminary staff recommendations.

(5) Discussion of the carrier's filings and the preliminary Commission staff proposals at a conference in which representatives of the carrier and the staffs of the respective state commissions and the FCC participate (i.e., a three-way meeting).

---

[1] AT&T Long Lines is scheduled for a complete review of depreciation rates in 1983; as a result, it did not file for SLELG rates for central office equipment this year.

10. During the past year, in addition to the filings in conjunction with the staff's normal triennial represcription cycle, we received SLELG proposals from the BOTC's listed in the caption of this proceeding. The need to resolve the issues raised by these filings in a timely manner required the staff to depart from its traditional procedures. Because it was apparent that there were insufficient staff resources to allow the complete review of life and salvage factors for the carriers requesting SLELG rates, the staff chose to omit portions of steps 2 and 3 above and instead use the life and salvage factors which underlie currently prescribed rates. In addition, time and resource constraints precluded the discussion of SLELG rates with the carriers and respective state commissions at three-way meetings. Instead, comments regarding the carrier filings and preliminary staff proposals were solicited from the carriers and respective state commissions via correspondence and telephone conversations.

11. On August 13, 1982, the staff sent review letters to the BOTC's and the respective state commissions outlining its assessment of the BOTC's SLELG studies and its own recommendations for SLELG rates. Subsequently, in September the BOTC's formally filed for SLELG rates for the central office equipment accounts. At that time, six BOTC's whose depreciation rates are scheduled for review in 1983 notified the staff of their intention not to file for SLELG rates for central office equipment. The staff analyzed the BOTC filings and arrived at its recommendations and, on October 12, 1982, issued a public notice (Report No. 2969) entitled, "Depreciation Rate Prescriptions Proposed For Domestic Telephone Companies." This public notice summarized the FCC staff's proposals for revised depreciation rates and the change in depreciation expense that would result if those proposed depreciation

rates were approved. On October 13, 1982, the staff transmitted to each company and respective state commission a copy of the October 12 public notice, schedules containing the proposed SLELG rates and the staff analysis underlying the proposed SLELG depreciation rates.

III. SUMMARY OF COMMENTS

A. *August 13, 1982 Review Letters*

12. Responses to the staff's August 13, 1982, review letters were received from AT&T, each of the BOTC's whose rates are under consideration here, and two of the BOTC's who decided not to file for SLELG rates this year. In addition the following state commissions responded: Indiana, Iowa, Kentucky, Louisiana, Maryland, Mississippi, North Dakota, South Carolina and Virginia.

13. AT&T, the BOTC's, and the Indiana and Mississippi commissions were in substantial agreement with the FCC staff position that SLELG rates should be used. On the other hand, the Iowa, Kentucky, Louisiana, Maryland, and Virginia commissions were opposed to the use of SLELG rates. The North Dakota and South Carolina commissions did not state whether they supported or opposed the use of SLELG rates.

14. AT&T, the BOTC's and the Indiana Commission agreed with most of the SLELG rates proposed by the FCC staff; however, they disagreed with the FCC staff position that SLELG treatment should not be allowed for the COE-Step-by-Step and COE-Crossbar accounts on the grounds that they are "dying" accounts that will be almost fully retired within a few years. AT&T stated that, although these are "dying" accounts, significant investment will be

added to these accounts over the next several years and that remaining-life rates would provide first year accruals of only one-half those provided by SLELG rates. AT&T also asserted that its detailed retirement plans for these accounts provide a sound basis on which to determine SLELG depreciation rates. Additionally, it stated that the FCC, in approving the SLELG method, left room for judgment as to what constitutes adequate data, and that, in the exercise of this judgment, weight should be given to the Commission's decision that SLELG is a preferred method. AT&T also contended that the use of the SLELG method in "dying" accounts is important in that it helps prevent the deferral of capital recovery beyond the physical life of the property. AT&T also stated that the FCC staff's proposals regarding future net salvage and interim retirement patterns warrant further investigation. Finally, AT&T stated that the life estimates underlying currently prescribed rates for COE-ESS are too long.

15. The Mississippi Commission also generally agreed with the use of SLELG rates; however, it stated that additional information would have to be reviewed before it could form an opinion as to the appropriateness of the staff's proposed curve shape for COE-Electronic.

16. The Kentucky Commission stated that it does not believe the use of SLELG is necessary in order to provide adequate capital recovery. It stated that the use of the remaining-life technique will allow proper recovery, but that, if SLELG rates are to be used, the rates proposed by the FCC staff are appropriate. The staff of the Kentucky Commission also endorsed the FCC staff's proposal to continue to use the remaining-life method for the COE-Step-by-Step and COE-Crossbar accounts. It stated that retirement dispersion patterns for these "dying" accounts could

not be determined for new additions in these subaccounts, and that, therefore, SLELG rates could not be properly implemented.

17. The Iowa Commission had no comments regarding the proposed changes in depreciation rates for Northwestern Bell Telephone Company's interstate operations; however, it stated that it would retain exclusive jurisdiction over the establishment of depreciation practices for the intrastate operations of Northwestern Bell Telephone Company and that it, therefore, did not concur in such changes for the intrastate plant in Iowa. The Louisiana Commission stated that it has not authorized South Central Bell to use the SLELG method for intrastate ratemaking purposes. The Maryland Commission contended that the benefits associated with the SLELG procedure are illusory because estimated service lives will always be inaccurate and, therefore, proper matching of capital consumption and recovery will not occur. It also claimed that SLELG depreciation methods have not been shown to be superior to the SLVG procedure. The Virginia Commission reiterated its comments made in response to an earlier public notice; i.e., that SLELG is neither necessary nor in the best interests of Virginia telephone companies or customers.

18. The North Dakota Commission stated that it believed Northwestern Bell would not file for SLELG rates for central office equipment until 1983, and that it would reserve comment until the filing.

19. The South Carolina Commission stated that it was concerned about several assumptions made by the staff as well as the underlying methodologies the staff used. It requested that the FCC postpone consideration of the

implementation of SLELG for central office equipment in South Carolina until after the scheduled three-way meeting in 1983. It stated that the three-way meeting is the appropriate forum for a complete enunciation of all its concerns and alternative proposals.

B. *October 12, 1982 Public Notice*

20. Responses to the staff's October 12, 1982 public notice were received from AT&T and the staffs of the Louisiana, Maryland and Virginia commissions.

21. AT&T and the Maryland and Virginia commissions reiterated their earlier comments in response to the staff's August review letters (see paragraphs 14 and 17). AT&T again stated that it supports the staff's proposals with the exception of the denial of SLELG treatment for the COE-Step-by-Step and COE-Crossbar accounts. Virginia expressed the concern that its comments with regard to AT&T's SLELG filings for outside plant were dismissed without sufficient consideration in FCC Order 82-353, *supra*. The Virginia Commission also questioned why our staff requested comments when we have already stated that the question of whether or not the SLELG method should be used was decided in Docket No. 20188.

22. AT&T Long Lines stated that it did not request SLELG treatment for accounts in which it did not maintain vintage retirement data. In addition, it agreed with the rates proposed by the staff in the October 12, 1982 public notice.

DISCUSSION OF ISSUES

A. *Use of SLELG*

23. In our decision in Docket No. 20188, we considered the arguments expressed by the parties for and against the use of the SLELG method and determined that the use of SLELG rates is appropriate, provided adequate data is available. In the discussion in the Final Report and Order, we found that the use of SLELG comports with the mandate of Section 1 of the Communications Act, "to make available...a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges..." 47 U.S.C. §151. We reaffirmed our decision allowing the use of SLELG in our Order on Reconsideration as well as in five prescription orders approved this year (viz., FCC 82-53, 88 FCC 2d 1567 (1982), FCC 82-353, *supra*, FCC 82-354, 90 FCC 2d 997 (1982), FCC 82-542, Mimeo No. 32468, and FCC 82-543, Mimeo No. 32469). Nevertheless, several states have again questioned whether the use of SLELG rates is warranted. Inasmuch as these states have not raised any new arguments or evidence regarding the use of SLELG rates, we have no basis to reverse our decision on this matter. Our rules, as amended in Docket No. 20188, clearly allow the use of SLELG for accounts in which adequate data is available to properly apply and monitor it. Therefore, we will allow its use.

24. Although the Virginia Commission is correct that the issue of whether or not the SLELG method may be used has already been decided, this does not mean it was meaningless to solicit comments. The primary purpose of the October 12, 1982, public notice was not to bring into question our rules, which clearly allow the use of the

SLELG method, but rather to solicit comments regarding the effective dates proposed by the carriers and the life and net salvage factors that were under consideration for use in determining SLELG rates. Virginia did not respond to these issues. However, several respondents did and their comments are considered in this order (see paragraphs 26-28).

B. *Preemption of States*

25. Several state commissions stated that they have not approved SLELG procedures for their jurisdictions. The presence or absence of state commission approval of SLELG rates does not control the prescription of SLELG rates in this order. The prescription of depreciation rates is plainly a matter within the Commission's jurisdiction under Section 220(b) of the Communications Act. We have today ruled that such depreciation orders are binding at both the federal and state levels. *See* Amendment of part 31, FCC 82- , Mimeo No. (adopted December 22, 1982).

C. *Life and Net Salvage Factors*

26. Our staff has stated that SLELG rates should be based upon the life and salvage factors determined in conjunction with the staff's last complete review of these companies' rates, because these companies are not scheduled for a complete review of depreciation rates until 1983 or 1984, and staff resources did not permit a complete review of life and salvage factors this year. In the October 12, 1982 public notice, the staff clearly stated its preference for the use of current life and salvage factors, and there were no comments to the contrary in response to that public notice. Furthermore, the BOTC's agreed with the staff and filed

for SLELG rates based upon the factors determined in the last complete depreciation rate review. In this instance, we find that the benefits derived from implementing the new methods in a timely manner outweigh any advantages that may be derived from improving the precision of the estimates through the preparation and review of new studies of life and salvage. Furthermore, any inaccuracies that may result will be identified and resolved in the regularly scheduled reviews in 1983 and 1984.

27. The South Carolina Commission contended that SLELG rates should not be prescribed until it has had an opportunity to discuss the rates at a three-way meeting. We agree with South Carolina that it would be preferable to prescribe rates only after all the steps outlined in paragraph 9 are completed; however, we believe that the completion of all the steps outlined in that paragraph would have resulted in an unacceptable delay in the implementation of SLELG rates. We, therefore, believe the staff's departure from the traditional review procedures (i.e., especially the decision not to hold three-way conferences) was justified. Furthermore, we find that, with the staff review letters having been sent to the carriers and respective state commissions in August and with the public notice having been issued in October, South Carolina and all other parties had a reasonable opportunity to review the company and FCC staff proposals and submit their views for our consideration.

28. In FCC 82-353, *supra*, we pointed out that, when there is a strong relationship between the age of retirements and net salvage, future net salvage estimates for embedded plant do not apply to future additions of plant. In the companies' most recent depreciation studies for the COE-Circuit and COE-Radio accounts, net salvage percentages and

the age of retirements were demonstrated to be highly correlated. As a result, the future net salvage estimates used in determining the remaining-life rates for embedded plant are not appropriate for use in determining SLELG rates for new additions to plant. The staff analyzed these accounts and made the necessary adjustments to convert future net salvage factors originally derived for embedded plant to future net salvage factors for use with new additions to plant. The proposed adjustments were provided to the carriers and state commissions in October, and no responses objecting to these proposals were received. Therefore, we support the staff's proposals for SLELG future net salvage percentages in these accounts.

D. *Accounts for which SLELG Rates are not Recommended*

29. In our final decisions in Docket No. 20188, we found that the SLELG method is acceptable if adequate data is available for the proper application of the method and if the carriers' record keeping practices will allow for the monitoring of the reasonableness of the rates. In each of the SLELG prescription orders approved to date, we have concluded that vintage retirement data is a minimum requirement for the proper application and monitoring of SLELG rates. In this proceeding, AT&T commented that it believes SLELG rates should be allowed for all accounts regardless of whether vintage retirement data is maintained; however, it offered no new argument or evidence to support this contention. There is, therefore, no basis on which to rescind the reporting requirements established in Docket No. 20188. We conclude that it is inappropriate to prescribe SLELG rates for accounts in which vintage retirement data is not maintained.

30. The staff proposes that new additions to the COE-Step-by-Step and COE-Crossbar accounts not be depreciated using the SLELG method. The staff argues that it is impractical to determine reasonable future survivor curves for these additions because these accounts consist of classes of equipment which are being rapidly retired from service. The staff proposes that new additions, as well as embedded plant, in these accounts be depreciated using the remaining-life method, and asserts that the remaining-life method will assure timely and complete recovery of capital. AT&T disagreed and argued that the objectives of the FCC, as stated in our decision in Docket No. 20188, would be frustrated by not applying SLELG rates to these accounts.

31. Both the FCC staff and the Kentucky Commission stated that estimated survivor curves for COE-Step-by-Step and COE-Crossbar have *not* been determined in previous depreciation studies and that it is impractical to do so at this time. This is because it has not been demonstrated that the companies can accurately estimate future additions or retirements for individual switching units. With the majority of remaining lives for electromechanical equipment in the three to seven year range, the error of these estimates will likely be significant. New additions to these accounts will clearly have very short and volatile estimated remaining lives, making the development of reliable survivor curves virtually impossible. Without reliable survivor curves, the development of an SLELG depreciation rate is illusory. This is because the remaining life "corrections" and curve shape changes would rapidly alter the overall depreciation rate for the account. We previously stated that SLELG rates should be used if adequate data exists to properly apply the method. Inasmuch as the future survivor curves cannot be practically

determined, we agree with the staff that the proper application of the method cannot be accomplished for these accounts.

32. Additionally, as noted by AT&T, the current Bell System investment in the electromechanical accounts is approximately $13 billion, virtually all of which will be retired over the next ten years. The current annual additions to central office equipment are nearly $7 billion. In this context we find that the $600 million being added annually to the electromechanical accounts, which consists largely of reused (i.e., previously installed) equipment and associated labor, is not significant.

33. AT&T is probably correct that the current remaining-life rates may be only one-half the first year SLELG rates. However, an examination of this by the staff revealed that, if remaining lives were updated annually, the resultant remaining-life rates would be comparable to the first year SLELG rates for COE-Step-by-Step and would average one-third lower for COE-Crossbar. In most cases remaining-life rates are *higher* than SLELG rates by the end of the second year. Considering the aforementioned volatility of the life and curve shape estimates underlying the SLELG method, we find that the additional accruals provided by the SLELG method are insignificant even over the first two years of application.

34. We do not agree with AT&T that the use of the remaining-life method risks any deferral of capital recovery beyond the remaining-lives of the assets. Remaining-life rates are designed to completely depreciate invested capital over the remaining life of a group of assets. This feature was the primary reason that we changed our rules in Docket No. 20188 to allow the use of the remaining-life

method. We concur with the staff's reasoning and find that the remaining-life method should be used for depreciation of the COE-Step-by-Step and COE-Crossbar accounts.

35. While we agree with the staff's reasoning on the use of the remaining-life method for the electromechanical accounts, we also believe that some special measure is required to assure full and timely capital recovery on these short remaining life assets. We, therefore, direct the staff to update remaining-life depreciation rates for these accounts on an annual basis as requested by the companies or as is deemed necessary by the staff. These updates will assure that capital recovery is not unnecessarily deferred.

E. *Original Cost and Net Salvage Rates for ELG*

36. We are only prescribing SLELG rates for the original cost of investment for the first four years of new additions to most central office and outside plant accounts. These rates will be applied until the next triennial review of depreciation for these companies. At that time the actual results of the use of the SLELG method will be evaluated, and methods and rates will be modified as necessary.

37. Present carrier accounting practices do not allow carriers to accumulate net salvage data by vintage for all classes of plant. For example, retirement of a complete bay of central office equipment may involve removal of equipment of several vintages, but would normally result in a single aggregate cost of removal and salvage. In this situation it is not feasible to allocate that cost of removal or salvage among the vintages in a meaningful manner. For this reason, instead of prescribing net salvage depreciation rates for each vintage, we are prescribing a single net salvage depreciation rate which is to be applied to all new

vintages until the next regular review. *See* FCC 82-53, FCC 82-353, and FCC 82-354.

F. *Conclusion*

38. Having considered the responses to the staff's review letters and public notice, the recommendations of the staff, and the proposals of the companies, we find the resulting SLELG rates listed in the Appendix to be appropriate rates to be applied, unless modified by further order of this Commission.

V. ORDERING CLAUSE

39. Pursuant to Sections 4(i) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§4(i) and 220(b), IT IS ORDERED, That the percentages of depreciation set forth in the Appendix to this order are prescribed effective on the dates listed.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico, Secretary

Attachment: Appendix*

* Only that portion of the Appendix relating to South Central Bell's depreciation rates in Louisiana is included.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation
Calculated under the Equal Life Group Methodology for
SOUTH CENTRAL BELL TELEPHONE COMPANY—
LOUISIANA

Acct.	Class or Subclass of Plant (a)	Year (b)*	Proj. Life (c) (Yrs.)	Fut. Net Salv. (d) (%)	Original Cost Rates Age at Begin. of Year 0.0 (e) (%)	0.5 (f) (%)	1.5 (g) (%)	2.5 (h) (%)	Net Salv. Rate (i=-d/c) (%)
221	Central Office Equipment								
	Non-Ded. Circuit	1983	15.6	-5	13.3	10.5	9.1	8.3	0.3
	DDS Circuit	1983	11.6	-4	15.1	13.0	11.6	10.6	0.3
	Radio	1983	21	-5	7.3	6.9	6.6	6.3	0.2
	Electronic	1983	21	1	8.3	7.0	6.3	6.0	0

*ELG rates are effective January 1 of the year shown in column b and are to be applied to plant additions for that year and subsequent years.

APPENDIX "B"

TESTIMONY AND EVIDENCE FROM PROCEEDINGS BELOW

EXCERPT FROM TRANSCRIPT OF HEARING ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Friday, June 3, 1983, p. 78

CROSS-EXAMINATION

BY MR. ABBOTT:

Q. Mr. Louiselle, in addition to the prefiled testimony which you gave in the 1982 rate case, you also were cross-examined in connection with that case, were you not?

A. That's correct.

Q. And during that cross-examination, a certified copy of the order of January 6, 1983, of the Federal Communications Commission was introduced into evidence before the Commission, was it not?

A. Yes, it was.

Q. And you were cross-examined on that?

A. Yes.

Q. And that was on or about January 17-18, 1983?

A. Yes.

Q. Approximately 12 days after the Federal Communications Commission issued the January 6 order?

A. Yes, assuming they issued it on the date appearing thereon.

DECLARATION

I, William J. Tricarico, declare as follows:

1. I am the Secretary of the Federal Communications Commission, in Washington, D.C. and have held that position since 1977. In that capacity I am responsible for maintaining the records in all Commission docketed proceedings. One of my duties is to ensure that Commission orders, decisions and other documents are served upon interested parties pursuant to regulatory and statutory requirements.

2. The document which I understand is the subject of this lawsuit—the order released on January 6, 1983, in CC Docket No. 79-105—contained a clause directing me to serve a copy of the order on each state commission. At the time the order was released, I delegated this function to the dockets branch of my office. Subsequently—on June 6 and 7, 1983—I checked with the responsible clerk in the dockets office. She told me that she had prepared copies of the order for mailing and that copies were mailed by employees in the Commission's mail room to all state public service commissions, including the Louisiana Public Service Commission, on or about January 7, 1983.

3. There is no statutory or regulatory requirement of which I am aware requiring any particular form of service upon state commissions. In this case the Commission served the order by regular mail. This is normal Commission practice and I do not know of any case in which the Commission has ever served a state public utility commission in any other way.

I declare under penalty of perjury that the foregoing

is true and correct, based on my knowledge and information.

Executed on June 7, 1983.

/s/ William J. Tricarico
WILLIAM J. TRICARICO

AFFIDAVIT

BEFORE ME, a notary public in and for the parish of Orleans, state of Louisiana, personally came and appeared:

LEWIS S. QUINN

who, deemed by me first duly sworn, did depose and say:

1. I am Secretary of the Louisiana Public Service Commission. I ordinarily receive service of process for the Commission, which is personally delivered pursuant to the provisions of Louisiana law to me at the office of the Commission, Suite 1630, One American Place, Baton Rouge, Louisiana. I also receive many of the mailings directed to the Commission by other regulatory agencies, including federal agencies.

2. The Commission receives hundreds of mailings annually from other regulatory agencies. These include mailings from the Federal Communications Commission ("FCC"). Orders, notices, publications, bulletins and other documents are apparently mailed routinely to state regulatory agencies. When received, this material is routinely routed by me to employees of the Commission or to the appropriate files. No action is taken upon receipt of

routine mailings in the absence of a reason to believe the Commission is specially affected by the transmitted material.

3. I have no recollection of receiving in the mail from the FCC the order that is relied on by the plaintiff, South Central Bell Telephone Co. ("South Central Bell"), in this case. Upon review of the files of the Commission, I learned that a copy of the order was received in the mail. However, this document apparently was not seen or reviewed by me, because it bears no marks indicating that I received it and routed it to an employee or to a file. The order may have been received and routed to an employee of the Commission as a matter of routine practice. The mailing contained no notice, letter of explanation, statement, directive or any other special notification that the Commission had been ordered by the FCC to take any action. The Commission does not make it a practice to routinely review the voluminous material published by the FCC to determine whether, by operation of law, the Commission might be required to change its practices as a result of these publications.

4. Traditionally, the depreciation rates of South Central Bell in Louisiana have been established in three-way meetings involving the Commission, the FCC and South Central Bell. These meetings occur each three years. In September, 1981, three-way meetings occurred in Biloxi, Mississippi, at which time a three year agreement was reached. At that time, all parties were aware of the methodologies employed by the Commission; depreciation lives were established to be used with these methodologies. The FCC did not object to the use of these methodologies by the Louisiana Commission, though it was noted that South Central Bell might apply for changes in the

methodologies. The FCC has never formally notified the Commission of its decision to rescind and abrogate the practices contemplated in the 1981 agreement, except insofar as this abrogation might be read into its order issued in January, 1983.

/s/ Lewis S. Quinn

Sworn to and subscribed before me
this ____ day of June, 1983.

_____
Notary Public

APPENDIX "C"

RECENT RELEVANT AND/OR UNPUBLISHED DECISIONS

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

83-1403

The Chesapeake and Potomac
Telephone Company of Maryland,

Appellee,

vs.

Public Service Commission of Maryland,
Frank O. Heintz, Chairman,
William A. Badger, Commissioner,
Lilo K. Schifter, Commissioner,
Wayne B. Hamilton, Commissioner,
Haskell N. Arnold, Commissioner

Appellants

and

Ronald Hawks, Executive Director and
Maryland Office of People's Counsel,

Defendants

Federal Communications Commission,

Amicus Curiae

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Senior District Judge. (C/A N-83-855)

Argued: December 9, 1983 Decided November 20, 1984

Before RUSSELL and MURNAGHAN, Circuit Judges and MICHAEL,* District Judge

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Kirk J. Emge, General Counsel for the Public Service Commission of Maryland (Sandra L. Hall, Assistant General Counsel on brief) for Appellants; D. Michael Stroud (Robert A. Levetown and Mark J. Mathis; David H. Lloyd, John A. Siliciano, Daniel I. Prywes, Arnold & Porter; J. William Sarver on brief) for Appellee.

PER CURIAM:

This is an appeal from an Order of the District Court granting a preliminary injunction requiring the Public Service Commission of Maryland (PSC) and its officials to comply with a Federal Communications Commission (FCC) Preemption Order dated January 6, 1983. Jurisdiction for this appeal is provided for in 28 U.S.C. §1292(a)(1) (1982).

PSC argues on appeal that the District Court had no jurisdiction to grant the preliminary injunction, or alternatively that the District Court abused its discretion in granting the preliminary injunction. Prior to addressing those arguments, it is important to discuss briefly the FCC Preemption Order underlying this appeal.

The Preemption Order prescribed depreciation rates and depreciation methods for certain equipment used by telephone companies. The FCC initially indicated that the

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* Hon. James H. Michael, Jr., United States District Judge for the Western District of Virginia, sitting by designation.

Preemption Order did not affect the authority of state utility commissions insofar as intrastate communications service was concerned. 89 F.C.C. 2d 1094, 1108 (1982). Subsequently, the FCC reversed its position, stating that the Preemption Order completely preempted the authority of state utility commissions to regulate depreciation rates and methods for the specified telephone equipment. C.C. Docket No. 79-105, F.C.C. No. 82-581, slip op. (Jan. 6, 1983).

Notwithstanding the FCC's position regarding the Preemption Order, PSC concluded that the FCC-prescribed rates and methods would be inappropriate in establishing intrastate depreciation rates. As a result, PSC decided not to comply with the Preemption Order in establishing depreciation rates sought by the Chesapeake and Potomac Telephone Company of Maryland (C&P).

In response to PSC's decision, C&P brought an action to force PSC to comply with the Preemption Order. As a part of that action, C&P obtained the preliminary injunction at issue here. The preliminary injunction required PSC and its officials to comply with the Preemption Order in establishing both interstate and intrastate depreciation rates and methods. The District Court granted the preliminary injunction until the resolution of *Virginia State Corporation Commission v. FCC*, No. 83-1136 (4th Cir. June 18, 1984), an action then pending concerning the validity and effect of the Preemption Order. Although PSC immediately appealed the District Court's decision, we reserved judgment on PSC's appeal until resolution of *Virginia State Corporation Commission v. FCC*, due to the relationship between the two cases.

We subsequently ruled in *Virginia State Corporation Commission v. FCC*, that the Preemption Order was a valid and complete preemption of state regulation regarding interstate and intrastate depreciation rates and methods for the specified telephone equipment. Based on our ruling in that case, we now address PSC's appeal of the District Court's decision granting the preliminary injunction. PSC's appeal consists of two arguments which are considered separately below.

I.

PSC's first argument is that the District Court lacked jurisdiction under 47 U.S.C. §401(b) to grant the preliminary injunction. That provision states:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

47 U.S.C. §401(b) (1948). There are four points to PSC's argument that the District Court lacked jurisdiction under Section 401(b).

First, PSC argues that the District Court lacked jurisdiction under Section 401(b) because PSC is not a "person" with the meaning of the section. This point is without merit because C&P's suit for preliminary injunction named not only PSC but also the officials comprising PSC as defendants. Thus, even if PSC is not a "person" within the meaning of Section 401(b), PSC's officials are expressly covered by that section.

Moreover, we believe that PSC must be considered a "person" within the meaning of Section 401(b). A contrary interpretation would undermine the Federal Communications Act by rendering PSC and other communications "entities" immune from enforcement actions by the FCC under Section 401(b). Therefore, we conclude that PSC's first point does not support its argument that the District Court lacked jurisdiction in this case.

Second, PSC argues that Section 401(b) did not provide the District Court with jurisdiction because the Preemption Order is not an "order" within the meaning of that section. Section 401(b) expressly covers only violations of FCC "orders". Relying on the distinction between administrative orders and rules stated in *CBS v. United States*, 316 U.S. 407, 418 (1942), PSC asserts that the Preemption Order is merely an administrative rule, and therefore outside the scope of Section 401(b).

Although PSC correctly cites *CBS v. United States* for the proposition that administrative orders and rules are distinguishable, we find that the Preemption Order is an "order" within the meaning of Section 401(b). Indeed, our ruling here is dictated by our analysis of the same Preemption Order in *Virginia State Corporation Commission v. FCC*, No. 83-1136 (4th Cir. June 18, 1984).

As noted above, in *Virginia State Corporation Commission v. FCC*, we ruled that the Preemption Order was a valid and complete preemption of state regulation concerning depreciation rates and methods for the specified telephone equipment. That opinion did not explicitly state our jurisdictional basis for reviewing the Preemption Order. Nevertheless, our jurisdiction in that case clearly came from 47 U.S.C. §402 (1982) because that section is the exclusive means by which this court can review orders such as the Preemption Order. Although *CBS v. United States* construed Section 402 to cover certain administrative rules and regulations, the express language of Section 402 only provides for review of FCC "orders". Since *CBS v. United States* was not discussed or mentioned in *Virginia State Corporation Commission v. FCC*, it is clear that our review of the Preemption Order in that case was based on the express language of Section 402. Thus, our analysis in *Virginia State Corporation Commission v. FCC* included an implicit ruling that the Preemption Order was an order, not a rule or regulation.

That implicit ruling dictates our ruling in the present case that the Preemption Order was an "order" within the meaning of Section 401(b). *Contra New England Telephone & Telegraph Co. v. Public Utilities Commission of Maine*, No. 83-1779 (1st Cir. June 29, 1984). Thus, Section 401(b) did provide the District Court with jurisdiction to grant a preliminary injunction concerning the Preemption Order. As a result, we conclude that PSC's second point provides no support for its argument that the District Court lacked jurisdiction in this case.

Third, PSC argues that Section 401(b) did not provide the District Court with jurisdiction because that section cannot be construed as creating an implied private

cause of action to enforce an FCC ruling. Obviously, this point is based on the assumption that the District Court did not have jurisdiction under Section 401(b) because the Preemption Order was not an "order" within the meaning of Section 401(b). Given our above ruling to the contrary, we conclude that PSC's third point is without merit.

Finally, PSC argues that the Johnson Act, 28 U.S.C. §1342, is a bar to preliminary injunctions such as the one at issue here. The Johnson Act states that:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
>
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. §1342 (1942).

Although PSC argues that the Johnson Act is applicable to this case, we note that all the prerequisites for application of the Act were not satisfied here. The District Court's jurisdiction in granting the preliminary injunction

was based on 47 U.S.C. §401(b). As such, Section 1342(1) of the Johnson Act was not satisfied. Since the four prerequisites of the Johnson Act are conjunctive, PSC's failure to demonstrate that Section 1342(1) was met here renders the Johnson Act inapposite to the preliminary injunction in this case. Therefore, PSC's fourth point does not support its argument that the District Court lacked jurisdiction to grant the preliminary injunction.

In sum, there is no support for PSC's first argument. As a result, we rule that the District Court had jurisdiction under 47 U.S.C. §401(b) to grant the preliminary injunction at issue here.

II.

Given our ruling that the District Court had jurisdiction to grant the preliminary injunction, we must address PSC's second argument—that the District Court abused its discretion in granting the preliminary injunction.

In considering whether to grant the preliminary injunction, the District Court applied the standard articulated in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977). Accordingly, the District Court examined:

> 1. The likelihood that C&P would be irreparably harmed if the preliminary injunction were not granted;
>
> 2. The likelihood that C&P's customers would be irreparably harmed if the preliminary injunction were granted;
>
> 3. The likelihood that C&P would prevail on the

merits of its action to force PSC to comply with the Preemption Order; and,

4. Whether the public interest would better be served by granting or denying the preliminary injunction.

PSC argues that the District Court's conclusion regarding each of the above factors was flawed in some way, and thus the District Court abused its discretion in granting the preliminary injunction.

First, PSC asserts that the District Court erroneously concluded that C&P would suffer irreparable harm if the preliminary injunction were not granted. PSC does not contest the District Court's finding that not granting the preliminary injunction would cost C&P approximately $44,000 per day in lost revenues (i.e., revenues C&P would be receiving if PSC complied with the FCC-prescribed depreciation rates for intrastate ratemaking). However, PSC argues that C&P's loss would not have been irreparable because the District Court could have fashioned an equitable remedy to compensate C&P in the event that C&P prevailed on the merits.

We believe that the District Court correctly found that C&P's loss would have been irreparable. Maryland law provides no statutory device for recovering such a loss, and as PSC concedes, the loss could not have been offset by charging higher rates in the future. *Public Service Commission v. Baltimore Gas & Electric Co.*, 40 Md. App. 490, 393 A.2d 193 (1978); *Chesapeake & Potomac Telephone Co. of Maryland*, 32 Pub. Util. Rep. 3d (PUR) 470, 475 (Md. PSC 1960). Although PSC proposes a court-made equitable remedy, we note that there is no authority cited supporting

that proposition nor has this court found any such authority. Since ratemaking in Maryland is reserved for the legislature, *Public Service Commission v. Baltimore Gas & Electric Co.*, 273 Md. 357, 329 A.2d 691, 694 (1974), we conclude that PSC's proposition is without merit. As such, we agree with the District Court that C&P would have suffered a substantial irreparable loss if the preliminary injunction had not been granted.

Second, PSC asserts that the District Court underestimated the harm to C&P's customers if the preliminary injunction were granted. PSC suggests that the preliminary injunction would force some customers to terminate their telephone service, but we do not believe such a result was likely. As noted by the District Court, the preliminary injunction resulted in an effective rate increase of one cent per day to C&P's customers. Furthermore, the rate increase was subject to a refund plus interest from C&P in the event that C&P lost on the merits of its case against PSC. Given the small amount of the rate increase and the promised refund by C&P, we rule that the District Court correctly concluded that the loss to C&P's customers was not irreparable and was far outweighed by the substantial and irreparable loss to C&P if the preliminary injunction were not granted.

Third, PSC argues that the District Court incorrectly concluded that C&P was likely to prevail on the merits of its case against PSC. Obviously, the fact that the District Court correctly predicted the result in *Virginia State Corporation Commission v. FCC* seriously undercuts PSC's argument. In addition, however, we believe that the District Court had ample justification when it granted the preliminary injunction to conclude that C&P was likely to succeed on the merits. At that time, among courts which

had considered the same issues as in this case, the majority position favored C&P's success on the merits. *Pacific Northwest Bell Telephone Co. v. Washington Utilities & Transportation Commission,* No. C83-214C (W.D. Wash. March 10, 1983), *appeal docketed* No. 83-3746 (9th Cir. April 7, 1984). *South Central Bell Telephone Co. v. Louisiana Public Service Commission,* No. 83-557-A (M.D. La. June 27, 1983), *aff'd,* No. 83-3494 (5th Cir. Oct. 11, 1984); *Southwestern Bell Telephone Co. v. State Corporation Commission of Kansas,* No. 83-4125 (D.Kan. May 16, 1983), *appeal docketed,* No. 84-2296 (10th Cir. Sept. 13, 1984). *Contra, New England Telephone & Telegraph Co. v. Public Utility Commission of Maine,* Civ. No. 83-0166-P (D. Me. June 15, 1983), *aff'd* No. 83-1779 (1st Cir. June 29, 1984). Consequently, we believe that the District Court did not err in concluding that C&P was likely to prevail on the merits.

Finally, PSC asserts that the District Court erred in finding that the public interest would better be served by granting the preliminary injunction. Even if we agreed with PSC's assertion, where the first three *Blackwelder* factors favor granting a preliminary injunction, issuance of the preliminary injunction is proper, notwithstanding a finding that the public interest would better be served by not granting the preliminary injunction. *Id.* at 196. Nevertheless, we believe the District Court correctly found that the public interest would better be served by granting the preliminary injunction. As noted by the District Court, the FCC operates under a Congressional mandate "to make available...to all the people of the United States a rapid, efficient, Nationwide, and world-wide...communications service with adequate facilities at reasonable charges..." 47 U.S.C. §151 (1937). Since the FCC issued the Preemption Order in an effort to accomplish its Congressional

mandate, we do not believe that the District Court erred in concluding that temporarily enforcing the Preemption Order would better serve the public interest. Thus, we dismiss PSC's final argument in support of its position that the District Court abused its discretion in granting the preliminary injunction.

In conclusion, we rule that there is no support for PSC's position that the District Court abused its discretion in granting the preliminary injunction. Given our ruling that the District Court had jurisdiction under 47 U.S.C. §401(b) to grant the preliminary injunction, we hold that the District Court's decision be

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 83-4090

SOUTHWESTERN BELL TELEPHONE CO.,

Plaintiff

vs.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS: RICHARD C. LOUX, JANE T. ROY AND PHILLIP R. DICK,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on for hearing of Plaintiff's Motion for Preliminary Injunction on April 8, 1983. Plaintiff

was represented by Gerald L. Goodell, Lawrence A. Dimmitt and David P. Mudrick. Defendants were represented by Brian J. Moline, Donald A. Low, Jim Flaherty and Rosemary O'Leary. The Court having reviewed the record in this case and heard oral arguments of counsel, finds the facts and states the conclusions of law as follows:

Findings of Fact

1. The FCC is a federal agency established by the Communications Act of 1934, 47 U.S.C. §151, *et seq.*

2. Plaintiff is a Missouri corporation doing business in Kansas as a public utility. It provides both intrastate and interstate service, and is subject to regulation by both the FCC and Defendants.

3. Defendant Commission is a Kansas commission authorized by Kansas law to regulate public utilities doing business in Kansas, and the remaining Defendants are individual commissioners of the Commission.

4. The FCC issued a Memorandum Opinion and Order (Exhibit E to Complaint) in CC docket 79-105, adopted December 22, 1982 and released January 6, 1983. In that Order, the FCC held that FCC-prescribed depreciation policies, methods and rates, including remaining life (RL), preempt and render void inconsistent state depreciation policies, methods and rates. The Order required Defendants to permit implementation of, and to recognize in establishing Plaintiff's intrastate revenue requirement, those policies, methods and rates.

5. The January 6, 1983 FCC Order has been in effect from its release date of January 6, 1983 and still is in effect.

Although it is on appeal, it has not been stayed.

6. The January 6, 1983 FCC Order was regularly made by the FCC and duly served.

7. Defendants' January 11, 1983 Order (Exhibit F to Complaint) rejected the preemption announced in the FCC's January 6, 1983 Order. Defendants accordingly failed and neglected to obey the FCC's Order, and rejected Plaintiff's attempted implementation in Kansas of the FCC-prescribed RL depreciation method and rates. Defendants still are disobeying that Order by refusing to allow implementation of RL.

8. Defendants' January 11, 1983 Order and its March 22, 1983 Order (Exhibit I to Complaint) denied Plaintiff revenue to compensate Plaintiff for the depreciation expense Plaintiff is required by the FCC to incur and reflect on its books.

9. Plaintiff has been and is being injured by Defendants' Orders. Due to those Orders, Plaintiff now is suffering an annual revenue shortfall of approximately $3 million, and irreparable damage of over $57,000 weekly.

10. The requested preliminary injunction can be issued without harm to Defendants or the public. This can be done by ordering Defendants to require Plaintiff to refund revenues collected pursuant to rates implementing RL depreciation in the event the FCC's Preemption Order is reversed on appeal and it is finally held that the FCC-prescribed RL depreciation method and rates are not binding on the states.

11. It is in the public interest to enforce an FCC

Order while it is in effect, and not in the public interest to permit Defendants to disobey an effective FCC Order.

Conclusions of Law

1. The Court has jurisdiction to enforce the FCC's January 6, 1983 Order and issue an injunction, pursuant to 47 U.S.C. §401(b) and 28 U.S.C. §1337.

2. The Johnson Act, 28 U.S.C. §1342, is not a bar to this action.

3. The FCC's January 6, 1983 Order has been in effect since January 6, 1983, and Defendants disobeyed and are disobeying it.

4. Plaintiff has at least a reasonable probability of success on the merits of its Complaint.

5. Without the requested relief, Plaintiff will be irreparably harmed. The public interest can be protected by ordering Defendants to require that increased revenues resulting from implementation of the remaining life depreciation method be collected subject to refund, as described in finding 10, above. Collection of rates subject to refund is adequate security.

6. Plaintiff is entitled to a preliminary injunction, and a preliminary injunction should issue.

DATED this 8th day of April, 1983 at Topeka, Kansas.

/s/ Richard D. Rogers
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 84-C-4

WISCONSIN BELL, INC.,

Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, NESS FLORES, BRANKO TERZIC and STANLEY YORK,

Defendants.

DECISION AND ORDER

This is a civil action seeking to enforce an order of the Federal Communications Commission [FCC] pursuant to 47 U.S.C. §401(b). The matter is before me on plaintiff Wisconsin Bell's application for injunctive relief against the defendants' disobedience of the FCC order. For the reasons stated below, the plaintiff's application for an injunction is granted.

This controversy involves an Order of the FCC mandating the use of certain depreciation methods by telephone companies. The telephone companies sought the approval of the new depreciation methods, which allow faster depreciation of physical plant and equipment, in order to better compete in newly unregulated interstate markets. State regulatory agencies, the Public Service Commission of Wisconsin [PSC] included, opposed the use of the accelerated depreciation methods because, among

other things, it would require an increase in rates over the short term to cover the accelerated depreciation expense.

On January 6, 1983, the FCC released a Memorandum Opinion and Order in which it held that its prescribed depreciation methods and rates preempted inconsistent State depreciation methods and rates, including those prescribed by the Public Service Commission of Wisconsin. 92 FCC 2d 864. The FCC's Preemption Order was appealed to the Fourth Circuit Court of Appeals on February 11, 1983. The PSC, Wisconsin Bell, and telephone companies and State regulatory agencies from across the country participated as intervenors in that appeal.

In the spring of 1983, representatives of the FCC, Wisconsin Bell, and PSC held a meeting to negotiate new depreciation parameters, as well as the implementation of the new, accelerated depreciation method known as Straight Line Equal Life Group [SLELG]. However, the PSC continued to object to implementation of SLELG. On September 2, 1983, the FCC issued a Notice for public comment on the depreciation rates it proposed to prescribe for Wisconsin Bell for 1984. The PSC was served with the Notice. On September 28, 1983, the PSC filed comments with the FCC in response to the Notice, reiterating its opposition to SLELG. On December 14, 1983, the FCC adopted its Order prescribing Wisconsin Bell's depreciation rates, including rates based on the SLELG method. In this Order, the FCC reiterated its preemption of inconsistent State depreciation methods and rates.

On December 20, 1983, the PSC issued its final Order authorizing rates for Wisconsin Bell. In this Order, the PSC refused to authorize the use of the SLELG depreciation method as ordered by the FCC. The PSC also denied

the implementation of intrastate service rates sufficient to permit recovery of the additional intrastate revenue requirements associated with the use of the SLELG depreciation method. According to Wisconsin Bell, the additional 1984 intrastate revenue resulting from the use of the SLELG depreciation method is $4.5 million.

The suit for injunctive relief to enforce the FCC's Order was filed January 3, 1984. At that time the validity of the FCC's preemption order was still under consideration by the Court of Appeals for the Fourth Circuit. On June 18, 1984, however, that court issued its decision upholding the FCC preemption order. *Virginia State Corp. Com'n v. F.C.C.*, 737 F.2d 388 (4th Cir. 1984).

Jurisdiction over this case is derived from the Communications Act of 1934, 47 U.S.C. §401(b), and 28 U.S.C. §1337. 47 U.S.C. §401(b) provides in pertinent part:

> "(b) *Orders of the Commission.*
>
> "If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representative of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

28 U.S.C. §1337 provides in pertinent part:

> "§1337. *Commerce and Antitrust Regulations; Amount in Controversy, Costs.*
>
> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies..."

This case does not fall within the prohibition of the Johnson Act, 28 U.S.C. §1342, which provides:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a ratemaking body of a State political subdivision, where:
>
> "1. Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> "2. The order does not interfere with interstate commerce; and
>
> "3. The order has been made after reasonable notice and hearing; and,
>
> "4. A plain, speedy and efficient remedy may be had in the courts of such State."

Jurisdiction here is based on the enforcement of an FCC order under a federal statutory scheme, not diversity of citizenship or a challenge to the order's constitutionality. *See, New England Telephone and Telegraph Co. v. Public*

Utilities Comm. of Maine, 570 F.Supp. 1558, 1566 (D. Maine 1983). Therefore, the Johnson Act does not prohibit my consideration of this case.

The PSC argues that I should not restrict myself to the issue of enforcement of the FCC order, but address its validity and substance as well. I am, however, prohibited from doing so by 28 U.S.C. §2342 and 42 U.S.C. §402, which provide:

> "§2342. *Jurisdiction of Court of Appeals.*
>
> "The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has *exclusive jurisdiction* to enjoin, set aside, suspend (in whole or in part), or *to determine the validity* of—
>
> "1. All final orders of the Federal Communications Commission made reviewable by section 402(a) of Title 47; (emphasis added)
>
> ....
>
> "§402. *Judicial Review of the Commission's Orders and Decisions.*
>
> "(a) *Procedure.* Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Chapter 158 of Title 28, United States Code [28 U.S.C. §§ 2341, *et seq.*]."

The FCC order at issue was, as previously stated, appealed to the Court of Appeals for the Fourth Circuit where it was upheld as a valid exercise of the FCC's statutory authority.

Many of the points raised by the PSC in this case pertain to the validity of the order and the authority of the FCC to issue it. Those questions have been resolved by a court which has exclusive jurisdiction to consider them under §2342. Therefore, the only question before me is the enforcement of the FCC order.

Under §401(b) of the Communications Act of 1934, Wisconsin Bell is entitled to the injunction it seeks if certain facts are found to exist. That section provides that an injunction *shall* issue if I find that the FCC order was "regularly made and duly served," that the defendant has disobeyed the order, and that the plaintiff is injured by the defendant's disobedience.

The FCC order meets the first standard set forth in §401(b), in that it was "regularly made and duly served." There is no evidence to indicate that the FCC deviated from its regular policymaking procedure in this case. The agency followed the usual rulemaking procedure under 47 C.F.R. §§ 1.399-1.429. There is no allegation that it did not. The preemption order was published in the Federal Register and served on all State regulatory commissions. 92 FCC 2d 864, 880. Several other district courts faced with this question have held that the FCC's preemption order was "regularly made and duly served," and I find no evidence to the contrary in this case. *See, New England Telephone and Telegraph, supra* at 1571; *South Central Bell Telephone Co. v. Louisiana Public Service Comm.*, 570 F.Supp. 227, 232 (N.D. La. 1983); *Pacific Northwest Bell Telephone Co. v. Washington Utilities and Transp. Comm.*, 565 F.Supp. 17, 21 (W.D. Wash. 1983); *The Chesapeake and Potomac Telephone Co. v. Public Service Comm.*, 560 F.Supp. 844, 847 (D. Md. 1983).

I also find that the PSC has disobeyed the order. In its December 20, 1983 order authorizing depreciation rates for Wisconsin Bell, it refused to allow the use of the SLELG method. It continues to resist the use of that method, in direct contravention of the preemption order.

The PSC argues, however, that it is not a "person" within the meaning of §401(b). Therefore, the argument goes, I have no jurisdiction over it. This argument was thoroughly addressed by the United States District court in Maine in *New England Telephone and Telegraph, supra* at 1568. There the court reviewed the definition of "person" in the Act. It found that although that definition did not explicitly refer to state commissions, it did not exclude them either. The court found that the definition was inclusive, not exclusive, stating:

> "A close reading of Section 153(i) and (t) of the Act [the relevant definitional sections] reveals that the [state commission's] argument overstates the rigor of the definitional structure of the Act. Section 153 states generally that 'for purposes of this chapter, *unless the context otherwise requires*' the following definitions apply. 47 U.S.C. Anno. §153 (1962) (emphasis added). The stressed phrase makes it clear that the definitions set out in section 153 are not intended to be exclusive, exhaustive or comprehensive. Rather, they are 'guideline' definitions whose scope and meaning are, as a general principle, to be varied as the context in which they are used in the Act may require in order to effectuate the congressional intent with which they are used.
>
> ...
>
> "The statute may thus be seen to be intended to provide jurisdiction in the federal courts

> sufficient generally to enforce the provisions of statutory law and the requirements of FCC orders made pursuant to them. It intends enforcement to occur against 'all persons' who are in violation of those provisions of law and the requirements of FCC orders. So general a concept of enforcement cannot logically admit an exception based upon narrow and technical distinctions of status as to particular types of legal entities. The enforcement purpose of the Act cannot be realized with its intended generality unless 'all persons' in that phrase's broadest ambit, found to be bound by the Act or order are subject to enforcement as prescribed by section 401(b)...
>
> "That being so, there is no basis to exclude from the definition of 'any person' any entity that is legitimately subject to the compulsions imposed by the Act or FCC orders made pursuant to it. This is especially true of state regulatory bodies, *Chesapeake*, 560 F.Supp. at 847, which may be regularly expected to be subject to a greater incidence of required compliance with the Act and FCC orders than would most other categories of persons and entities except, possibly, regulated utilities."

Id. at 1567-68.

I agree with the *New England Telephone and Telegraph* analysis. The PSC is a "person" within the meaning of §401(b). Also, it has clearly disobeyed the FCC order.

Finally, Wisconsin Bell has been injured by the PSC's actions. As a result of the PSC's refusal to allow implementation of the SLELG method, Wisconsin Bell stands to lose about $4.5 million this year.

The PSC does not dispute this, but argues instead that Wisconsin Bell has failed to show the "irreparable harm" necessary for preliminary injunctive relief according to traditional equity principles. However, according to *Illinois Bell Telephone v. Illinois Commerce Comm.*, 740 F.2d 566, 571 (7th Cir. 1984), "where a plaintiff seeks an injunction to prevent the violation of a federal statute that specifically provides for injunctive relief, it need not show irreparable harm." *Id.* at 571. Therefore, Wisconsin Bell's showing of injury is sufficient for the purposes of an injunction under §401(b).

Having met the requirements of §401(b), Wisconsin Bell is entitled to the injunction it seeks. Accordingly, IT IS ORDERED:

1. That the defendants, their successors, agents and employees are permanently enjoined from disobeying the Order of the Federal Communications Commission in CC Docket No. 79-105, dated January 6, 1983, and related depreciation represcription orders including FCC Order #83-587, released December 20, 1983.

2. That the defendants, their successors, agents, and employees are required forthwith to allow Wisconsin Bell to employ the depreciation methods prescribed by the FCC, to determine Wisconsin Bell's increased intrastate revenue requirements resulting from use of such depreciation methods and to reflect that increased revenue requirement in all rate and revenue proceedings involving Wisconsin Bell, including PSC Docket #6720-TI-3.

SO ORDERED at Milawaukee, Wisconsin, this 13th day of November, 1984.

BY THE COURT:

/s/ Terrence T. Evans

TERRENCE T. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX "D"

FEDERAL STATUTES AND REGULATIONS

5 U.S.C. §552(a)(1) .

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

28 U.S.C. §1254(2)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

* * *

(2) By appeal or by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;... .

28 U.S.C. §2342(1)

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

* * *

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. §2349(b)

The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application. The hearing on an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the

application. On the final hearing of any proceeding to review any order under this chapter, the same requirements as to precedence and expedition apply.

47 U.S.C. §401

(a) The district courts of the United States shall have jurisdiction, upon application of the Attorney general of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

(c) Upon the request of the Commission it shall be the duty of any United States attorney to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter and for the

punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

(d) The provisions of sections 28 and 29 of Title 15, section 345(1) of Title 28, and sections 44 and 45 of Title 49, shall be held to apply to any suit in equity arising under sections 201-222 of this title, wherein the United States is complainant.

47 U.S.C. §402(a)

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5.

49 U.S.C. §16(12)

Proceedings to enforce orders other than for payment of money. If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

47 C.F.R. §0.455

(a) All opinions and orders of the Commission (including concurring and dissenting opinions) are mailed to the parties and, as part of the record, are available for inspection in accordance with §§0.453 and 0.455.

(b) All final decisions and other documents currently adopted by the Commission having precedential or historical significance are published in the FCC Reports. Older materials of this nature are either published in the FCC Reports or are in the process of being published. In the event that such other materials are not yet published in the FCC Reports, reference should be made to Pike and Fischer Radio Regulations. See §§0.412(a) and 0.416.

(c) All rule making documents are published in the Federal Register. See §0.411(b)(2).

(d) Formal policy statements and interpretations designed to have general applicability and legal effect are published in the Federal Register and the FCC Reports. See §§0.411(b)(2) and 0.416. Commission decisions and other Commission documents not entitled formal policy statements or interpretations may contain substantive interpretations and statements regarding policy, and these are published as part of the document in the FCC Reports. General statements regarding policy and interpretations furnished to individuals, in correspondence or otherwise, are not ordinarily published. A series of individual interpretations may be collected and published in the Federal Register and the FCC Reports.

(e) If the documents described in paragraphs (a)-(d) of this section are published in the Federal Register, the FCC Reports, or Pike and Fischer Radio Regulations, they may be relied upon, used or cited as precedent by the Commission or private parties in any matter. If they are not so published, they may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question or by such persons against the Commission. No person is expected to comply with any requirement or policy of the Commission unless he has actual notice of that requirement or policy or unless a document stating it has been published as provided in this paragraph. Nothing in this paragraph, however, shall be construed as precluding a reference to the rationale set forth in a recent document which is pending publication if the requirement or policy to which the rationale relates is contained in a published document or if actual notice of that requirement or policy has been given.

84-870

NO.

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1984

LOUISIANA PUBLIC SERVICE COMMISSION, THOMAS E. POWELL, GEORGE J. ACKEL, ED KENNON, LOUIS LAMBERT AND JOHN F. SCHWEGMANN,

Appellants

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Appellee

On Appeal from the United States Court of Appeals for the Fifth Circuit

APPENDIX TO JURISDICTIONAL STATEMENT VOL. I—APPENDIX A

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APPENDIX "A"
OPINIONS BELOW

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Plaintiff-Appellee,

v.

LOUISIANA PUBLIC SERVICE COMMISSION,
Thomas E. Powell, George J. Ackel, Ed Kennon,
Louis Lambert and John G. Schwegmann, Jr.,

Defendants-Appellants.

No. 83-3494.

United States Court of Appeals.
Fifth Circuit.

Oct. 11, 1984.

Appeal from the United States District Court
for the Middle District of Louisiana.

Before GEE, RANDALL and JOHNSON, Circuit Judges.

RANDALL, Circuit Judge:

The Louisiana Public Service Commission appeals a modified preliminary injunction of the District Court for the Middle District of Louisiana requiring the Louisiana Public Service Commission to grant an increase in intrasate telephone rates sufficient to allow the South Central Bell Telephone Company to cover increased operating expenses of $40,506,000 resulting from the implementation

of depreciation rates and methodologies prescribed by the Federal Communications Commission. The district court issued its order upon finding that the Louisiana Public Service Commission had failed to comply with an earlier, non-dollar specific preliminary injunction requiring the Louisiana Public Service Commission to utilize the federally mandated depreciation practices. Because we conclude that the district court acted within its authority and discretion in issuing the modified injunction, we affirm.

I. BACKGROUND

A. Basic Principles of Public Utility Ratemaking.

Because this case involves the role of depreciation rates and methodologies in determining the revenue requirements of a regulated utility, we begin by briefly reviewing certain basic principles of regulatory ratemaking.[1] Public regulatory commissions have the responsibility of ensuring that regulated utilities on the one hand do not receive monopolistic returns but on the other hand do recover sufficient revenues to pay legitimate expenses and to provide a rate of return on investment that will compensate present investors and attract new capital when needed. In determining a rate structure that will adequately meet a utility's prospective revenue requirements, a regulatory commission makes predictions based on the utility's revenues, expenses, and investments in some selected previous year, called the "test year." Although

[1] For a more comprehensive discussion of agency ratemaking and associated problems, see generally J. Bonbright, Principles of Public Utility Rates (1961); Foster, *Fair Return Criteria and Estimation*, 28 Baylor L.Rev. 883 (1976); Schwartz, *Inflation and Utility Rate Regulation*, 4 Utah L.Rev. 89 (1982). For a description of ratemaking in Louisiana, see *South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 373 So.2d 478 (La.1979); Defendant's Exhibit 1, at 1-9.

the normal costs of service incurred by a utility will usually increase from year to year, the test year serves as a reasonably acurate basis for estimating future operating expenses and return requirements because the increasing costs generally will be offset, at least theoretically, by additional revenue supplied by new customers. Once the cost of service for the test year is adjusted for any extra ordinary change expected to occur in the upcoming year, the regulatory commission is able to calculate tariffs relying on test year figures as representative of future revenue requirements.

A utility's "rate base" is the total amount of its investments in providing its service, including its investment in working capital for the test year. The utility's earnings, or the amount returned on investment, is its revenues minus its expenses. The utility's rate of return is therefore determined by dividing the utility's total investment by its earnings. Thus, an increase in a utility's expenses requires a corresponding increase in a utility's revenues in order for the rate of return to remain constant. Similarly, an adjustment in the utility's rate of return necessitates a corresponding adjustment in the utility's revenues, assuming expenses and investment remain the same.

In determining the expenses incurred by a utility in the test year, regulatory agencies use principles of depreciation accounting. Under these principles the cost of an asset having a useful life of more than one year is not counted as an expense in the year incurred. Rather, the costs are capitalized and spread over that period of time during which the item is in service. The costs of the asset are then recouped from future ratepayers through depreciation charges. A change in the depreciation rate, therefore, results in a change in the expenses incurred during the first

years of the asset's useful life, although of course, as long as the prediction of useful life is accurate, the total amount of expenses incurred over the asset's useful life would remain the same. The purpose of depreciation accounting is to match costs with the revenues they generate. Expenditures for long-lived assets are thought to be more properly charged over the various periods in which the assets are useful in the production of revenues. *See generally* Docket No. 20,188, 83 F.C.C.2d 267, 270-71 (1980).

B. FCC Regulations on Depreciation.

Regulatory power over the telecommunications industry is exercised by both federal and state governments. In 1934, Congress enacted the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, "to make available, so far as possible ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. To achieve this goal, Congress gave the Federal Communications Commission (FCC) regulatory authority to establish depreciation practices and to require the keeping of prescribed accounts.[2] The FCC's power, however, was

[2] 47 U.S.C. § 220(a)-(b). Section 220(b) provides:

> (b) The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed

carefully curtailed not to extend to intrastate communications.[3] Under the Communications Act, state regulatory commissions, such as the Louisiana Public Service Commission, retain the authority to regulate intrastate rates, facilities, and practices of the telecommunications industry. *See* La. Const. art. IV, § 21; La.Rev.Stat.Ann. § 45:1161, *et seq.*

In 1980, after seven years of study, the FCC adopted the "remaining-life" and "straight-line equal life group" (SLELG) depreciation methods. Docket No. 20,188, 83 F.C.C.2d 267 (1980), *on reconsideration,* 87 F.C.C.2d 916 (1981). According to the FCC, use of these depreciation methods would "calibrate more closely the flow of revenues with the recovery of capital," 83 F.C.C.2d at 281, and thus provide communications utilities with additional cash flow needed to meet the construction requirements of a rapidly changing technology.[4] The FCC acknowledged that use of

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(Footnote 2 continued)

> percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

[3] Several provisions of the Act preclude the FCC from exercising jurisdiction over intrastate communications. Section 152(b) provides that "nothing in this chapter shall be construed ... to give the [FCC] jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication." *See also* 47 U.S.C. § 221(b).

[4] The "remaining-life" method of depreciation replaced the "whole-life" method. Although both are used in connection with straight-line depreciation, remaining life more accurately reflects the current experienced life of an asset. The FCC explained:

the accelerated depreciation methods would result in increased revenue requirements over the short term, but stated that "the relative size of the increment will be repaid many times over in future years as the ability of regulated telephone companies to provide '... rapid, efficient ... communication service with adequate facilities at reasonable charges is enhanced.' "[5] *Id.* For similar reasons, the FCC

(Footnote 4 continued)

> The essential difference between whole-life and remaining-life depreciation rate calculations is that the former attempts to determine that annual charge that would be appropriate in the event that the current predictions of whole-life (estimated future life added to current experienced or expired life) were in fact correct. The remaining-life process proceeds on the premise that the current prediction of remaining or prospective life is correct and attempts to allocate any unrecovered or unallocated costs over that time period. That is, the original cost less accumulated reserve, or net unrecovered cost is divided by the prospective remaining-life in order to determine the annual future charges to expense.

83 F.C.C.2d at 289. The SLELG procedure replaced the straightline vintage group (SLVG) method. The essential difference between these two is that SLELG breaks equipment down into smaller subgroups in calculating useful life. Under SLELG, therefore, estimates of useful life are in the aggregate more accurate.

[5] The FCC further stated:

> All accounting measures are important, but in the case of capital intensive industries the measure of depreciation becomes even more important. On the whole such industries are frequently regulated and annual revenue requirements reflect both the current measure of the consumption of capital (depreciation) and a provision for the costs (return requirement) of the capital still unrecovered through depreciation charges. If depreciation policies or practices were to be determined solely with concern for the level of revenue requirements, the actual measure of depreciation might be misstated. Such distortion of the measure of depreciation would in turn lead to a misstatement of the results of operations for the period and would also misstate the relative

in 1981 ruled that station connections were to be expensed immediately instead of capitalized and recovered over their useful life through depreciation. Docket No. 79-105, 85 F.C.C.2d 818 (1981).

In April 1982, the FCC, in response to a petition for clarification submitted by the National Association of Regulatory Utility Commissioners (NARUC), declared that its prior rulings on depreciation methodologies and sata-tion connections were not applicable to the states. 89 F.C.C.2d 1094 (1982). Refusing to repudiate forty years of administrative practice and court precedent, the FCC ruled that, "when state regulation is reconcilable with federal policies or rules, there is no occasion for us to override state agency actions in furtherance of legitimate state regulatory objectives."[6] *Id.* at 1108.

(Footnote 5 continued)

> position of the enterprise as shown by its balance sheet. If such distortions were perceived by present and potential investors and were deemed to be deleterious to the safety and recovery of their investment, they in turn would likely demand a higher return on their funds. Consequently, a failure to properly measure by understating these costs would, in the long run, probably be offset by higher costs of capital without any real avoidance of the ultimate need to provide full recovery for the capital.

83 F.C.C.2d at 271-72.

[6] The FCC in addition stated:

> We have always given special consideration to the needs and views of state commissions in developing accounting and depreciation rules and most State commissions have chosen to follow most accounting and depreciation rules prescribed by this Commission. Departures have nonetheless occurred from time to time.
>
> This Commission has never attempted to prevent any State commission from departing from our accounting and

Following the FCC's preemption ruling, on June 7, 1982, the American Telephone and Telegraph Company (AT&T), on behalf of itself and associated Bell System Operating Companies, filed a petition for reconsideration. On the same day, General Telephone Company of Ohio sought a "declaratory ruling" ordering the Public Utilities Commission of Ohio to use the same depreciation rates for intrastate purposes as had been prescribed by the FCC. After a joint reply period for the two petitions, the FCC, in a "Memorandum Opinion and Order" released on January 6, 1983 (Preemption Order), reversed itself and declared that its "depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rules." 92 F.C.C.2d 864, __ (1983). The FCC based its Preemption Order on both the preemptive effect of § 220 of the Act and the agency's own regulatory power.[7] Although conceding that its depreciation methods

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(Footnote 6 continued)

> depreciation rules. Indeed we have expressly recognized that State commissions have a right to do so.

89 F.C.C.2d at __.

[7] The FCC rejected the argument that 47 U.S.C. § 152(b), *see supra* note 2, prohibits the FCC from preempting state depreciation practices. The FCC stated:

> Section 220(b) only prohibits the states from setting depreciation rates for telephone property inconsistent from those prescribed by the FCC. It does not require that any particular tariff for intrastate service be accepted by the state commissions. The setting od depreciation rates and classes of depreciable property only resolves a single issue impacting the ratemaking process. It does not restrict the state commission's broad discretion in setting charges for individual services.

92 F.C.C.2d at __.

would have an immediate upward impact on rates, the FCC reasoned that more timely capital recovery would encourage greater technological progress, which would, in turn, result in more efficient service and lower costs. According to the FCC, "[i]f competition is to be viable, it is necessary for prices to reflect depreciation expenses that are realistic for a competitive market." 92 F.C.C.2d at __. The FCC concluded: "[W]e find it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communications Act and are accordingly void." 92 F.C.C.2d at __.

C. The Proceedings Below.

On May 3, 1982, the South Central Bell Telephone Company (South Central Bell) filed tariff revisions with the Louisiana Public Service Commission (Louisiana Commission) seeking an increase in intrastate rates in the amount of $238,600,000. As partial justification for the increased revenues, South Central Bell relied on the FCC's adoption of remaining life and SLELG depreciation methods in 1980 and the FCC's ruling in 1981 requiring the expensing of station connections. At the time of the filing, the Louisiana Commission required both the use of certain depreciation practices that recovered the cost of an asset at an initially slower rate and the capitalizing, instead of expensing, of station connections. On or about January 7, 1983, the FCC mailed copies of its January 6 Preemption Order to the Louisiana Commission, and on January 19, 1983, the order was published in the *Federal Register*.

The Louisiana Commission on May 19, 1983, denied South Central Bell's request for a rate increase. In its order, the Louisiana Commission expressed concern over Louisiana's declining economy and found the utility's

current rate of return, about 13.5%, was comparable to the rate found reasonable in 1981. Thus, because the rates were not increased nor was the rate of return reduced, the Louisiana Commission clearly implied its refusal to implement FCC-prescribed depreciation methods.[8]

In response to the Louisiana Commission's refusal to increase intrastate rates, South Central Bell filed suit in federal district court seeking a preliminary and permanent injunction requiring the Louisiana Commission to implement the depreciation methodologies and the expensing of station connections mandated by the FCC. After a hearing, the district court found that it had jurisdiction under 47 U.S.C. § 401(b) and that the prerequisites of that provision had been met. The district court, however, stated that, in light of the fact that intrastate ratemaking is still within the exclusive province of the states, the court would not order South Central Bell to implement specific tariffs. Instead, the court ordered South Central Bell to comply generally with the FCC Preemption Order and to set new rates within ten days. *South Central Bell Tel. Co. v. Louisiana Public Service Comm'n*, 570 F.Supp. 227, 232-34 (M.D.La. 1983).

On July 7, 1983, the Louisiana Commission, pursuant to the preliminary injunction, issued an order setting new rates. In this order, the Louisiana Commission found that application of the FCC-prescribed accounting methods

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[8] On the same day the Preemption Order was adopted, the FCC issued a ruling in Docket No. 82-576 that prescribed specific SLELG rates to be used in calculating depreciation for South Central Bell equipment. This order, released a few days before the Preemption Order, also declared FCC-prescribed depreciation methods binding on the states. If the Louisiana Commission had used these specific rates, the revenue requirements of South Central Bell would certainly have increased.

resulted in an increased expense level of $40,506,000. The Louisiana Commission, however, after reducing the rate of return from 13.5% to 12%, also found that an increase in revenue of only $12,700,000 was needed to meet those increased costs. The Louisiana Commission justified the reduction in the rate of return on the grounds that the prime rate had declined since 1981 and that 7.5% of South Central Bells' total capital was cost-free investment tax credits.[9] No evidence was received in connection with the July 7, 1983 order.

Soon thereafter, South Central Bell filed a motion in district court seeking to modify the preliminary injunction

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[9] In its order, the Louisiana Commission stated:

> As noted, the Commission denied the rate request of South Central Bell in May, but did not make a determination of the fair rate of return on equity. The currently authorized overall rate of return of South Central Bell was set in 1981, when market interest rates were significantly higher than they are today. The prime rate has remained at about 10½ per cent for some time. In addition, the rate of return earned by the Company includes a return on unamortized investment tax credits, which constitute approximately 7.5 per cent of South Central Bell's total capital. In fact, however, these tax credits are cost-free investment of the Company, so in reality the rate of return on its investor-supplied equity is higher than that authorized for regulatory purposes. When these factors are viewed in light of the continued low level of inflation, and continued high unemployment, we find that a rate of return of equity of 12 per cent is sufficient to assure confidence in the Company's financial soundness, will be adequate to maintain and support its credit and will permit it to raise the capital necessary to perform its public functions. The gross revenue increase necessary to produce a rate of return on equity of 12 per cent after taking account of the ratemaking adjustments proposed by a consultant of the Commission, Bruce M. Louiselle, and recognizing the full amount of the FCC-mandated accounting changes as quantified by South Central Bell, is $12,700,000.
>
> Record at 203.

or, alternatively, to hold the Louisiana Commission in contempt. The district court, stressing the fact that the Louisiana Commission had not received any additional evidence, found that "the Commission had absolutely no justification for failing to order an increase in revenues sufficient to cover the increased operating costs of the company." 570 F.Supp. at 237. The district court stated:

> The Public Service Commission, here has not complied with the order of this court. The Public Service Commission itself has determined that there is an increase in operating expenses of $40,506,000.00 and, unless there are reasonable and proper adjustments to be made, that increase in operating costs mandates an equivalent increase in revenues. Adjusting fair return on equity downward, in the absence of evidence justifying such an adjustment, was arbitrary and capricious—a simple exercise in arithmetic designed to minimize the increase in telephone rates.

Id. at 237-38. The court concluded that, based on the foregoing, it had no alternative but to accept the Louisiana Commission's finding that South Central Bell had increased expenses of $40,506,000 and to require the Louisiana Commission to increase rates sufficiently to cover that amount. The Louisiana Commission appeals.

II. DISCUSSION.

The Louisiana Commission challenges on appeal the modified preliminary injunction on grounds that (1) the statutory requirements of 47 U.S.C. § 401(b) have not been met, (2) the district court failed to comply with traditional principles of equity in issuing the injunction, (3) the

injunction sets intrastate rates in violation of the Communications Act, and (4) under well-established principles of comity the district court should have abstained from exercising jurisdiction over the case. We note at the outset that the Louisiana Commission does not challenge, and nor can we consider, the validity of the underlying FCC Preemption Order. As the district court correctly held, the exclusive mechanism for obtaining judicial review of FCC action is a direct appeal to the court of appeals pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).[10] *See FCC v. ITT World Communications, Inc.*, __ U.S. __, 104 S.Ct. 1936, 1939-40, 80 L.Ed.2d 480 (1984); *Southwestern Bell Tel. Co. v. Arkansas Public Serv. Comm'n*, 738 F.2d 901, 905 (8th Cir.1984). Thus, because this case concerns the validity of a preliminary injunction issued by the district court pursuant to § 401(b), we assume for purposes of this appeal that the underlying Preemption Order is a legal and proper act of the FCC.[11]

A. Section 401(b).

Section 401(b) provides as follows:

> (b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the

[10] Section 2342 provides that "[t]he court of appeals ... has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of ... all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." Section 402(a) provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter ... shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28."

[11] We point out nonetheless that the Fourth Circuit in a § 402(a) proceeding has recently upheld the validity of the Preemption Order. *Virginia State Corp. Comm'n v. FCC*, 737 F.2d 388 (4th Cir.1984). The Louisiana Commission was an intervenor in those proceedings.

> Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

Under § 401(b), a party seeking enforcement of an FCC declaration may obtain an injunction upon a finding that (1) the declaration is an FCC "order" within the meaning of the Act, (2) the order was regularly made and duly served upon the defendant, (3) the defendant is in disobedience of the order, and (4) the party seeking the injunction has been injured by the defendant's disobedience. In the proceeding below, the district court found that all four of these prerequisites had been met. On appeal, the Louisiana Commission disputes the district court's findings that the January 6 Preemption Order (1) was an "order" and (2) had been "duly served," both within the meaning of the Act.[12]

1. The Meaning of "Order."

The Louisiana Commission presents what can be taken to be two distinct arguments for is position that the meaning of the word "order" in the statute does not encompass the FCC January 6 Preemption Order. First, the

[12] The Louisiana Commission also argues that it is not in disobedience of the Preemption Order or the original injunction. We address this argument in subpart C.

Louisiana Commission contends that the Preemption Order was issued merely to clarify the law and not to compel state regulatory commissions to take any action. Specifically, the Louisiana Commission asserts that the order merely is an interpretation of the preemptive effect of § 220(b), which provides that the FCC "shall, as soon as practicable," make depreciation prescriptions. According to the Louisiana Commission, the Preemption Order is not binding and thus is unenforceable under § 401(b).

In determining the effect of an administrative action, we must, of course, look beyond its label to its substance. *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 908-09 (5th Cir.1983); *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir.1979). If an administrative agency intends a declaration to be no more than an expression of its construction of a statute or rule, the declaration is "interpretive" in nature and does not have the full force of law. If, on the other hand, an agency acts in accordance with its legislatively delegated rulemaking authority, the declaration is "legislative" in nature and binding on all appliable persons. *Chamber of Commerce of the United States v. OSHA*, 636 F.2d 464, 468 (D.C.Cir. 1980); *Brown Express, Inc., supra*, at 700; *Joseph v. United States Civil Service Comm'n*, 554 F.2d 1140, 1154 n. 26 (D.C.Cir.1977). In addition, administrative agencies may make rules of general application in individual adjudicative proceedings. *See Shell Oil v. FERC*, 707 F.2d 230, 235 (5th Cir.1983).

The district court held that the language of the Preemption Order "is plainly directed to all state regulatory bodies and plainly declares that their depreciation procedures must comply with FCC procedures." 570 F.Supp. at 236. We agree. The FCC adopted the Preemption Order in a rulemaking proceeding only after receiving a significant number

of comments and reply comments.[13] Although the FCC stated in the course of the Preemption Order that § 220(b) of the Communications Act automatically preempted state depreciation policies, the FCC also explicitly relied on its own legislatively delegated power to preempt. 92 F.C.C.2d at __. Indeed, the FCC in the Preemption Order did far more than merely interpret the Act and relevant legislative history. The FCC analyzed the policies underlying its depreciation methodologies and concluded in no uncertain terms that "this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rates."[14] Reading the Preemption Order as a whole, we have no

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[13] The FCC received comments from the Arkansas Public Service Commission, the Public Utilities Commission of Ohio, the Public Utilities Commission of the State of California, the Virginia State Corporation Commission, NARUC, the United States Independent Telephone Association, the Ohio Office of Consumers' Counsel, the United Telephone System, Inc., and the Idaho Public Utilities Commission, Inc.

[14] The FCC also stated:

> In the past the communications marketplace was typified by monopoly conditions and life and salvage factors underlying the state rates were generally very similar, if not identical, to those used by the Commission. In that environment it was not essential that the Commission assert all the authority granted it. See *Computer and Communications Industry Association v. FCC*, [693 F.2d 198 (D.C.Cir.1982)]. As discussed, *infra*, in the more competitive conditions prevailing today, the utilization of proper methods and rates is more critical if the proper incentives are to be created to insure that the marketplace will function efficiently to bring the benefits of that competition to the ratepayers of this country. Therefore, where it is necessary to protect important federal policies against frustration by inconsistent state actions, we will exercise the full breadth of our depreciation powers.

92 F.C.C.2d at __.

doubt that in issuing the order the FCC intended not merely to advise the public on its interpretation of the preemptive effect of § 220(b), but to preempt as a matter of substantive law inconsistent state practices.[15]

Second, the Louisiana Commission contends in effect that the FCC Preemption Order, regardless of its binding effect, is not enforceable under § 401(b) because that provision only applies to those orders that are the product of an adjudicative proceeding. By making this argument, the Louisiana Commission is in effect inviting us to travel down the same path recently traversed by the First Circuit in *New England Tel. & Tel. Co., supra.* After carefully reviewing the arguments both in favor and against adopting such a narrow interpretation of § 401(b), however, we find that we must decline this invitation and instead join the Eighth Circuit in upholding the authority of the district court under § 401(b) to enforce the FCC Preemption Order. *See Southwestern Bell Tel. Co., supra.*

The First Circuit in *New England Tel. & Tel. Co., supra,* based its interpretation of "order" in § 401(b) on several policy considerations.[16] The court expressed

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[15] In so holding, we join the First, Fourth and Eighth Circuits which have also regarded the Preemption Order as a rule of substantive law. *See New England Tel. & Tel. Co. v. Public Utilities Comm'n,* 742 F.2d 1, 4 (1st Cir.1984); *Virginia State Corp. Comm'n, supra,* at 393-94; *Southwestern Bell Tel. Co., supra,* at 904.

[16] The First Circuit also relied on the definition of the word "order" in the Administrative Procedure Act (APA), 5 U.S.C. § 551(6), as at least furnishing a starting point from which to begin the inquiry. As the First Circuit acknowledged, however, the Communications Act was enacted more than ten years before the APA, and the APA itself only makes its terminology mandatory in APA contexts. *See* 5 U.S.C. § 551. In non-APA contexts administrative terminology is still used inconsistently among administrative agencies. *See* B. Schwartz, Administrative Law § 4.1 (2d ed. 1984) (the Treasury continues to call its

concern, first, that, if § 401(b) were construed to allow enforcement of general FCC rules and regulations by private parties, the FCC's primary control over the enforcement of the Communications Act would be seriously undermined. Such a construction, second, would place the interpretation of the rules and regulations in the hands of the some 700 federal district judges, thus threatening the sound development of a coherent nationwide policy. Third, a broad construction of § 401(b) would often result in fractionated review of intrastate rates by encouraging private parties to challenge in federal court discrete aspects of the state ratemaking procedure. Fourth, the court noted that allowing private parties to utilize § 401(b) solely to enforce specific adjudicatory orders would make more intelligible the inability of district courts in § 401(b) proceedings to consider the substantive validity of the underlying order.

While we acknowledge the importance of these policy considerations, we are not persuaded by them to adopt a restrictive construction of the statute. First, the First Circuit was not able to cite, and our own research fails to uncover, a single precedent in support of its interpretation.[17] At least two Supreme Court decisions, however, can be read as providing support for interpreting the term "order" in § 401(b) to include administrative rules. In *Ambassador, Inc. v. United States,* 325 U.S. 317, 65 S.Ct. 1151, 89 L.Ed.

(Footnote 16 continued)
general rules "decisions" and the FCC continues to call its regulations "orders").

[17] Although the First Circuit cites *Kroeger v. Stahl,* 148 F.Supp. 403, 406 (D.N.J.), *aff'd,* 248 F.2d 121 (3d Cir.1957), in support of the contention that "order" in § 401(b) should be given the same meaning that it has under the APA, we note that *Kroeger* involved not a rule but a "special temporary authorization" that was held not to be a "final disposition."

1637 (1945), the Supreme Court considered the validity of a preliminary injunction issued against hotels in violation of a tariff regulation imposed by the telephone company. The tariff regulation had been filed in compliance with an FCC rulemaking order and had not been specifically upheld by the FCC as reasonable. The Supreme Court, in sustaining the injunction, upheld the district court's determination that the defendant hotels were in violation of the regulation and found that the suit to enjoin the violation was authorized under "§ 401." Although the Court failed to specify the subsection of § 401 to which it was referring, it is clear that the suit had to have been brought under § 401(b) since § 401(a) only authorizes a district court to enjoin violations of the Act itself.[18] If § 401(b) is available to enforce tariff regulations filed pursuant to agency rulemaking, the section should surely be available also to enforce rules and regulations of the agency itself.

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[18] Section 401(a) provides as follows:

> (a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

In denying a petition for rehearing, the First Circuit in *New England Tel. & Tel. Co.* distinguishes *Ambassador, Inc.* on the ground that the action in that case might have been brought pursuant to § 401(a). The First Circuit relies on the statement made by the Supreme Court that "a departure from the [tariff] regulation is forbidden by the Act." 325 U.S. at 325, 65 S.Ct. at 1155. Violating rules and regulations of the FCC though is just as violative of the Act as is disobeying tariff regulations. *See* 47 U.S.C. § 416(c). Under the First Circuit's reasoning, therefore, any regulatory violation would authorize a § 401(a) injunction. We think it is clear, however, in light of the existence of § 401(b), that the scope of a district court's authority under § 401(a) is limited to enjoining violations of specific provisions of the Act and not rulemaking orders or tariff regulations.

Furthermore, in *Columbia Broadcasting System, Inc. v. United States (CBS)*, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942), the Supreme Court held that FCC regulations were "orders" within the meaning of § 402(a).[19] In asking us to construe "order" more narrowly in the context of § 401(b) than did the Supreme Court in interpreting the neighboring § 402(a), the Louisiana Commission faces the "natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433, 52 S.Ct. 607, 609, 76 L.Ed. 1204 (1932). *See also Hotel Equities Corp. v. CIR*, 546 F.2d 725, 728 (7th Cir. 1976); *Curry v. Block*, 541 F.Supp. 506, 518 (S.D.Ga.1982), *aff'd*, 738 F.2d 1556 (11th Cir.1984). This presumption, of course, "is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." 286 U.S. at 433, 52 S.Ct. at 609.

CBS dealt with FCC regulations that precluded a broadcast station from obtaining a license if the station had enterd into certain types of contracts with a broadcast network. CBS brought the action under § 402(a) in order to secure judicial review of the regulation. In finding that the regulation was an order within the meaning of § 402(a), the Supreme Court pointed out that, inasmuch as the regulations governed and had an immediate impact upon the contractual relations between the stations and the networks, the implementation of the regulation was not dependent on administrative action. The Court held that, therefore, in order to avoid the harm that would otherwise result from

[19] *See supra* note 10.

the execution of an illegal regulation, judicial review under § 402(a) was appropriate. According to the Court, "[w]hen, as here, such regulations are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of § 402(a)." *Id.* 316 U.S. at 418-19, 62 S.Ct. at 1201.

The First Circuit, in considering *CBS*, found that the Court's reasoning did not apply to a § 401(b) proceeding because the same considerations of fairness supporting a broad interpretation of "order" were not present in that context. We disagree. Substantial unfairness can result from either compliance with an improper regulation or noncompliance with a proper one. Especially in the context of a pervasively regulated industry, beneficiaries of a self-executing regulation should not be denied the intended effect of the regulation without recourse merely because the FCC has yet to institute enforcement proceedings. In the instant case, the FCC Preemption Order was issued in response to a perceived failure of the regulatory system to furnish the telephone industry with sufficient cash flow. If each telephone company must wait to receive this benefit until the FCC is able to institute individual enforcement proceedings, telephone companies may well suffer for a significant period of time the harm the Preemption Order was designed to prevent.

Second, we adopt a broad construction of § 401(b) because we are not convinced that the policies put forward by the First Circuit are threatened seriously enough to outweigh the vital policies furthered by private enforcement of FCC rulemaking orders. The FCC has broad discretion to act through either case-by-case adjudication or the rulemaking process. *SEC v. Chenery Corp.*, 332 U.S. 194,

202, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947); *Avoyelles Sportsmen's League, Inc., supra,* at 909. Thus, if the FCC deems that enforcement of a certain policy is desirable on an individual basis, it certainly has the discretion to proceed other than by adopting a self-executing rule. To a large extent, therefore, the FCC itself can avoid private incursions upon its enforcement responsibilities. Moreover, through the use of agency intervention and amicus curiae briefs, as well as through the application of the doctarine of primary jurisdiction, the courts and the FCC should be able to prevent both significant inconsistent applications of FCC rules and serious judicial encroachment upon FCC responsibilities. *See, e.g., American Trucking Ass'n v. ICC,* 682 F.2d 487, 491 (5th Cir.1982) (primary jurisdiction allows court faced with an issue requiring the special expertise of an agency to suspend proceedings pending referral of the issue to the agency for official position).

Most importantly, however, we simply do not see how the FCC's responsibility in developing and enforcing a coherent communications policy would be significantly undermined by giving the FCC discretion to adopt self-executing rules and then to rely in part on private enforcement. We firmly believe, in fact, that under appropriate circumstances such an approach would promote significant federal interests in conserving limited agency resources and in accelerating the implementation of FCC rules and regulations. We can also envision situations in which only a private party would have a sufficient interest in the obedience of an FCC rule to institute an enforcement proceeding. *Cf. FCC v. Sanders Brothers Radio Station,* 309 U.S. 470, 477, 60 S.Ct. 693, 698, 84 L.Ed. 869 (1940) (person with a financial stake in the granting of a license may be the only one with sufficient interest to seek judicial review).

In short, we find that both precedent and sound policy support a broad interpretation of § 401(b) to allow private enforcement of FCC rules and regulations.[20] Therefore, we hold that the FCC Preemption Order is an order within the meaning of § 401(b).[21]

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[20] Further support comes from cases involving § 16(12) of the Interstate Commerce Act, 49 U.S.C. § 16(12) (repealed). The legislative history of § 401(b) indicates that Congress took the text of § 401(b) almost word for word from § 16(12). *See* S.Rep. No. 781, 73d Cong., 2d Sess. 9 (1934). Although some courts have held that under § 16(12) only orders that specifically command certain individuals to take particular actions may be enforced, *see, e.g., Farmers' Loan & Trust Co. v. Northern Pac. Ry.*, 83 F. 249 (D.Wash.1897), other courts, including the Fifth Circuit, have enforced rules and regulations under the statutory provision. *See Pacific Fruit Express Co. v. Akron, Canton, & Youngstown R.R.*, 524 F.2d 1025, 1031 (9th Cir.1975), *cert. denied*, 424 U.S. 911, 96 S.Ct. 1107, 47 L.Ed.2d 315 (1976); *United States v. City of Jackson*, 318 F.2d 1, 9 (5th Cir.1963).

[21] The Louisiana Commission also argues in its reply brief that South Central Bell is not a "party injured" by the Louisiana Commission's noncompliance with the Preemption Order. We find this argument to be without merit. The FCC reconsidered the preemptive effect of its depreciation policies in response to a petition filed by AT&T on behalf of itself and the associated Bell System Operating Companies, including South Central Bell. 92 F.C.C.2d at __. *But see South Central Bell Tel. Co. v. Louisiana Public Serv. Comm'n*, 412 So.2d 1069, 1075 n. 8 (La.1982). (South Central Bell held not to be a party in *Computer II* decision for purpose of La.Rev.Stat.Ann. § 45:1180). Moreover, the same policy considerations that persuaded us to adopt a broad reading of "order" equally persuades us to adopt a broad reading of "parties." Finally, we note that courts that have allowed private parties to enforce rules and regulations of the Interstate Commerce Commission under § 401(b)'s sister provision, 49 U.S.C. § 16(12), have regarded as a party any person injured who was a member of the benefited class. *See Carothers v. Western Trans. Co.*, 554 F.2d 799, 805 (7th Cir.1977); *Pacific Fruit Express Co. v. Akron, Canton, & Youngstown R.R.*, 355 F.Supp. 700, 709 (N.D.Cal.1973), *aff'd*, 524 F.2d 1025 (9th Cir.1975), *cert. denied*, 424 U.S. 911, 96 S.Ct. 1107, 47 L.Ed.2d 315 (1976). *Cf. Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 72, 91 S.Ct. 203, 210, 27 L.Ed.2d 203 (1970).

2. The Meaning of "Duly Served."

Section 401(b) authorizes a district court to issue a writ of injunction only upon a finding that the underlying FCC order was "duly served." It is undisputed that service was accomplished below both by mail and by publication in the *Federal Register.* Moreover, the Louisiana Commission concedes that it had actual notice of the FCC Preemption Order. The Louisiana Commission, nevertheless, asserts on appeal that the order was not "duly served" within the meaning of the Act because the Louisiana Commission was not personally served with the order. Relying on *Milliken v. Meyer,* 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940), the Louisiana Commission argues that, in light of the hundreds of mailings the Louisiana Commission receives annually from regulatory agencies, service by mail cannot be considered service reasonably calculated to give actual notice. In addition, the Louisiana Commission contends that it is entitled to personal service because that is the manner of service provided to common carriers under various FCC regulations.

We think the Louisiana Commission misconceives the purpose of the "duly served" prerequisite of § 401(b). There is no indication that the requirement of due service was designed to give a person in violation of an FCC order promulgated according to proper procedure a right to additional notice of that order before enforcement proceedings can commence. Rather, we believe the term "duly served" quite plainly refers only to procedural regularity. *See Southwestern Bell Tel. Co., supra,* at 907. Under this construction, § 401(b), by directing the district court to determine whether "the order was regularly made and duly served," authorizes and requires the district court, although lacking authority to review the substance of an FCC order,

to find before issuing an injunction that the order is enforceable as a matter of procedural law. Thus, the requirement of "due service" is met if the defendant in a § 401(b) proceeding received notice legally sufficient to make the order enforceable.

Under the APA, a rule is enforceable once it is published in the *Federal Register*. 5 U.S.C. § 552(a)(1). The Supreme Court has held that appearance of a rule in that publication constitutes legal notice to the general public. *See, e.g., Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85, 68 S.Ct. 1, 3-4, 92 L.Ed. 10 (1947). Although we recognize that some agencies may be required to give additional notice to interested parties as a result of the agencies' own rules and regulations, *see Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C.Cir.1976), FCC regulations clearly require only notice by publication for rulemaking documents. *See* 47 C.F.R. § 0.445(c).[22] Thus, because the FCC Preemption Order at issue in this case was in fact published in the *Federal Register*, we hold that the order was duly served within the meaning of the Act and enforceable against the Louisiana Commission.

B. Irreparable Injury.

Under traditional principles of equity, a court can usually issue a preliminary injunction only upon a finding of irreparable injury. *See, e.g., Canal Authority v. Callaway*, 489 F.2d 567, 572-73 (5th Cir.1974). The

[22] We not further that uner 47 C.F.R. § 0.445(a), FCC opinions and "orders" require only service by mail. Thus, even if "order" were given the same meaning in FCC regulations that the word has in the context of § 401(b), the Preemption Order would have been "duly served." Although one provision of the Act, § 416(a), requires personal service of FCC orders, that provision by its own terms applies only to carriers.

Louisiana Commission argues that the equitable requirement of irreparable injury also applies to § 401(b) proceedings and that the district court erred in not requiring South Central Bell to make such a showing. It is well-established, however, that, when, as is the case here, an injunction is expressly authorized by statute and the statutory conditions are satisfied, the usual prerequisite of irreparable injury need not be established. *See, e.g., Gresham v. Windrush Partners,* 730 F.2d 1417, 1423 (11th Cir.1984); *Trailer Train Co. v. State Board of Equalization,* 697 F.2d 860, 869 (9th Cir.1983), *cert. denied,* __ U.S. __, 104 S.Ct. 149, 78 L.Ed.2d 139 (1983); *Atchison, Topekka and Santa Fe Ry. v. Lennen,* 640 F.2d 255, 259 (10th Cir.1981); *Murry v. American Standard, Inc.,* 488 F.2d 529, 531 & n. 2 (5th Cir.1973); *United States v. Hayes International Corp.,* 415 F.2d 1038, 1045 (5th Cir. 1969); *cf. Hecht v. Bowles,* 321 U.S. 321, 331, 64 S.Ct. 587, 592, 88 L.Ed. 754 (1944) (court's discretion under statute expressly authorizing injunction "must be exercised in light of the large objectives of the Act"). The Seventh and Eighth Circuits have already applied this general rule to private parties seeking to enforce under § 401(b) FCC rulemaking orders. *See Illinois Bell Tel. Co. v. Illinois Comm'n,* 740 F.2d 566, 571 (7th Cir.1984); *Southwestern Bell Tel. Co. v. Arkansas Public Service Comm'n, supra,* at 908 n. 15. Accordingly, we hold that the district court did not err in issuing the preliminary injunction absent a finding of irreparable injury.[23]

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[23] Cases cited by the Louisiana Commission in support of the need to find irreparable injury are distinguishable in that they involve implied causes of action. *See, e.g., Rondeau v. Mosinee Paper Corp.,* 422 U.S. 49, 63-64, 95 S.Ct. 2069, 2078-79, 45 L.Ed.2d 12 (1975) (plaintiff in asserting cause of action not authorized expressly by statute or its legislative history is not relieved of the burden of the traditional prerequisites of relief).

C. The Modified Injunction.

As discussed above, the district court issued its modified preliminary injunction upon a finding that the Louisiana Commission had violated the court's original injunction ordering the Louisiana Commission to reset intrastate rates using FCC-prescribed depreciation and methodologies and rates. The court found that the Louisiana Commission, in reducing South Central Bell's fair rate of return from 13.5% to 12%, had acted arbitrarily and capriciously and with the sole purpose of covering South Central Bell's increased expenses without having to order a corresponding increase in rates. The district court therefore ordered the Louisiana Commission to increase rates sufficiently to allow South Central Bell to recover its additional operating expenses in full. On appeal, the Louisiana Commission argues that it complied with the original injunction and that it reasonably adjusted the fair rate of return downward to take into account the lower investment risks that would result from compliance with the FCC Preemption Order. In addition, the Louisiana Commission asserts that the dollar-specific terms of the modified injunction constitute an unwarranted intrusion into the Louisiana Commission's responsibility to regulate intrastate rates and is prohibited by § 152 of the Communications Act.

1. The Finding of Non-compliance.

In holding that the Louisiana Commission had violated the injunction, and thus the Preemption Order, by reducing the rate of return merely to minimize telephone rates, the district court necessarily had to make two determinations: (1) that neither the injunction nor the Preemption Order

allowed the Louisiana Commission to avoid setting increased rates by simply lowering the rate of return and (2) that the Louisiana Commission did in fact reduce the rate of return other than for a valid reason. We are therefore called upon here not only to review a finding of fact, but also to interpret an FCC order whose substantive validity is beyond our judicial scrutiny.

The district court determined below that under the Preemption Order, "unless there are reasonable and proper adjustments to be made, [the] increase in operating costs mandates an equivalent increase in revenues." 570 F.Supp. at 237. The district court thus held that the Preemption Order, although explicitly only preempting the use of inconsistent state depreciation practices, also barred the states from avoiding the consequences of the Preemption Order by manipulating other independent variables used in computing intrastate rates, such as the rate of return.[24] Although we recognize that under this construction the Preemption Order comes perilously close to undermining completely state authority and discretion to set intrastate rates,[25] we find that, in light of the order's regulatory

[24] By "independent" we do not mean to say that the depreciation practices used by a utility have absolutely no effect on the fair rate of return. As the depreciation rate is accelerated, capital recovery is quicker and, as a consequence, the risks to investors may well be reduced. The rate of return, however, is independent in the sense that a regulatory agency in setting the rate of return must take into account factors other than its effect on the costs of services. *See* J. Bonbright, *supra* note 1, at 148-58.

[25] In his dissenting opinion in *Virginia State Corp. Comm'n v. FCC*, *supra*, at 398, Judge Widener predicted: "The logical result of [upholding the Preemption Order] is to permit the FCC to abrogate completely the state regulation of intrastate ratemaking for the carriers' intrastate operations in violation of the Communications Act."

purpose, we must accept the district court's interpretation.

In the Preemption Order, the FCC stated that preemption is necessary in order to furnish the telephone industry with more timely capital recovery. According to the FCC, greater capital recovery is needed under the competitive conditions that exist today in order to encourage the modernization of facilities and the investment of capital. The FCC stated;

> Approximately 75 percent of exchange plant is allocated to the intrastate jurisdiction. It is clear that unless telephone plant, including that portion subject to allocation to the intrastate jurisdiction, is depreciated at a reasonable rate, improperly timed capital recovery will occur. Indeed, in an increasingly competitive environment, it is possible that improper capital recovery could delay or prevent modernization which would add to the costs borne by ratepayers and could, ultimately, threaten carriers' ability to fully recover their invested capital. Moreover, the extent of state action attempting to prevent carriers from utilizing our depreciation prescriptions places substantial burdens on carriers and could well impair their ability to raise the investment capital they will need to fully compete in the continually evolving competitive telecommunications marketplace. Such a result could undermine the achievement of the Commission's objective to develop policies that will engender a dynamic, efficient telecommunications marketplace with services being provided at reasonable prices.

92 F.C.C.2d at __. This purpose would plainly be severely frustrated if state regulatory commissions could offset increased expenses by reducing the rate of return without

any regard for the companies' needs to compensate investors and to attract new capital.[26] Thus, because we think it is clear that the Preemption Order in prohibiting inconsistent state depreciation practices was intended also to preclude state responses designed to evade the consequences and the purposes of that preemption, we uphold the district court's first determination.

In disputing the district court's second determination, that the rate of return was reduced merely to avoid high telephone rates, the Louisiana Commission challenges a finding of fact. Thus, we apply the "clearly erroneous" standard of review as articulated in Federal Rule of Procedure 52(a). *See Gearhart Industries, Inc. v. Smith International, Inc.*, 741 F.2d 707, 710 (5th Cir.1984); *Apple Barrel Productions, Inc. v. Board*, 730 F.2d 384, 386 (5th Cir.1984). The district court's conclusion that the Louisiana Commission had lowered the rate of return without justification relied largely on the Louisiana Commission's May 19, 1983 order denying a rate increase. As partial justification for that denail, the Louisiana Commission stated: "Since the Company has earned a rate of return comparable to that found to be reasonable by the Commission in [1981], we find no justification for an increase in rates at this time." According to the district court, this statement constituted "very clearly a reiteration in 1983 that the rate of return established in 1981 is

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[26] These criteria are the ones usually considered in computing the rate of return. *See, e.g., Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591, 603, 64 S.Ct. 281, 288, 88 L.Ed. 333 (1944) ("[The rate of return] should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.").

still in effect." 570 F.Supp. at 237. The district court further found no indication that, between the denial on May 19 and the July 7 order reducing the rate of return, conditions or information available to the Louisiana Commission had changed sufficiently to warrant the downward adjustment. In fact, the district court found that the Louisiana Commission had received no additional evidence during that time. Although on appeal the Louisiana Commission contends that the application of FCC-prescribed depreciation practices is itself sufficient justification for the reduction in the rate of return because of associated lower investor risk, we note that this explanation was never presented to the district court and that it was presented to us for the first time in the Louisiana Commission's reply brief. Based on these considerations, we hold that the district court's finding was not clearly erroneous[27] and that the Louisiana Commission was in fact in violation of the injunction.

2. The Power of the District Court.

The Louisiana Commission asserts two possible grounds for its contentin that the modified injunction was beyond the power of the district court because it was dollar-specific. First, the Louisiana Commission contends that, by requiring a specific increase in rates, the district court violated § 152(b) of the Communications Act which prohibits both the FCC and the district court from setting

[27] While the court apparently did not hold an evidentiary hearing before modifying its injunction, the parties were afforded and took advantage of the opportunity to brief and argue fully their positions to the district court. Moreover, both parties were permitted wide latitude in filing attachments to their briefs and memoranda. *See Commerce Park at DFW Freeport v. Mardian Const. Co.*, 729 F.2d 334, 340 (5th Cir. 1984).

intrastate rates. The district court justified its dollar-specific injunction on the ground that it relied entirely on the Louisiana Commission's own calculations of the impact the FCC-prescribed depreciation practices would have on South Central Bell's expense level. Thus, reasoned the district court, it did not "set rates."

We reject this contention of the Louisiana Commission, but not for the reasons stated by the district court. Section 152(b) states that "nothing in this chapter shall be construed to give [the FCC] jurisdiction with respect to ... charges ... for or in connection with intrastate communication." Section 401(b) generally gives the district court authority to enjoin violations of FCC orders. Neither section imposes restrictions on the court's authority to enforce an FCC order; rather, it is clear that under the Act the extent of the court's power to enjoin is commensurate with the reach of the underlying order. That being the case, we cannot determine whether the district court exceeded its authority under the Act in issuing the dollar-specific injunction without also establishing whether the Preemption Order being enforced was an *ulta vires* act of the FCC. Therefore, because we must assume the substantive validity of a FCC order in an appeal from a § 401(b) enforcement proceeding, we must also refrain, as long as the injunction was necessary to the enforcement of the FCC order, from inquiring whether the district court's enforcement action was per se beyond its authority under the Act.

The second ground asserted by the Louisiana Commission in support of its attack on the specific terms of the injunction is that, by ordering an increase in rates in the amount of $40,506,000, the district court exceeded

mandates of the Preemption Order. This argument is without merit. We have already concluded that the Louisiana Commission violated the Preemption Order by manipulating the rate of return for the sole purpose of avoiding high telephone rates. Thus, we have no trouble finding tht the injunction requiring a raise in the rates equal to the increase in expenses is sufficiently tailored to the dictates of the Preemption Order. We note, however, that the Preemption Order only prohibits those changes in the rate of return made merely to avoid the effect of FCC-prescribed depreciation practices. The modified injunction, therefore, will not in the future bar the Louisiana Commission from adjusting the rate of return as long as the determination to do so is made in good faith.

D. Comity.

The Louisiana Commission finally contends that, even if the district court acted within its statutory and equitable authority in issuing the modified preliminary injunction, the principle of comity requires abstention because the matters before the district court were predominantly local in nature.[28] The Louisiana Commission relies on *Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951), in which the Supreme

[28] We reject out of hand the Louisiana Commission's claim that the Johnson Act, 28 U.S.C. § 1342, prohibits the district court from issuing the injunction. The Johnson Act is applicable only when "[j]urisdiction is based solely on diversity of citizenship or repugnance of the [state action] to the Federal Constitution." § 1342(1); *see also DeKalb County v. Southern Bell Tel. & Tel. Co.*, 358 F.Supp. 498, 504 (N.D.Ga.1972) (all four preconditions must be present before Johnson Act is applicable), *aff'd*, 478 F.2d 700 (5th Cir.1973). As the district court noted, South Central Bell here asserts jurisdiction under § 401(b) of the Communications Act, not upon any alleged repugnance of the defendant's action to the Constitution. 570 F.Supp. at 234. *See also Chesapeake & Potomac Tel. Co. v. Public Serv. Comm'n*, 560 F.Supp. 844, 847 (D.Md.1983).

71 S.Ct. 762, 95 L.Ed. 1002 (1951), in which the Supreme Court held that a district court should abstain from intervening in state regulatory matters that are largely of local concern and fall within the special expertise of state administrative agencies or reviewing courts. *See also Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); *Gulf Water Benefaction Co. v. Public Utility Comm'n*, 674 F.2d 462 (5th Cir.1982).

We find that this cse is not an appropriate one for abstention. Unlike *Alabama Public Service Comm'n* and *Burford*, this case concerns issues in no way dependent on local factors or local expertise for their resolution. Rather, the claim presented here is predicated upon a naked exercise of the federal preemption power. Under these circumstances, it is well-established that "thee basic premise of preemption—avoiding needless federal court intervention into important matters within the state's jurisdiction to regulate—obviously is lacking." *Aluminum Co. of America v. Utilities Comm'n*, 713 F.2d 1024, 1030 (4th Cir.1983), *cert. denied*, __ U.S. __, 104 S.Ct. 1326, 79 L.Ed.2d 722 (1984). *See also Baggett v. Department of Professional Regulation*, 717 F.2d 521, 524 (11th Cir. 1983) ("When, because of preemption a particular state proceeding is beyond its regulatory authority, the need for protection of the state's comprehensive regulatory scheme ... lends no support for abstention ...."); *International Brotherhood of Electrical Workers v. Public Service Comm'n*, 614 F.2d 206, 212 n. 1 (9th Cir.1980) ("If a preemption claim is well-founded ... *Burford* abstention cannot be appropriate.). Accordingly, we hold that the district court properly exercised jurisdiction in the instant case.

III. CONCLUSION.

For the foregoing reasons, we hold that the district court properly issued the preliminary injunction.

AFFIRMED.

SOUTH CENTRAL BELL TELEPHONE COMPANY

v.

LOUISIANA PUBLIC SERVICE COMMISSION,
Thomas E. Powell, George J. Ackel, Ed Kennon,
Louis Lambert and John F. Schwegmann.

Civ. A. No. 83-557-A.

United States District Court,
M.D. Louisiana

June 27, 1983.

On Motion For New Trial Aug. 1, 1983.

Herschel Abbott, Jr., New Orleans, La., for Plaintiff.

Michael P. Fontham, New Orleans, La., Marshal B. Brinkley, Louisiana Public Service Comm., Baton Rouge, La., Shelly Zwick, Asst. U.S. Atty., Baton Rouge, La., for defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

JOHN V. PARKER, Chief Judge.

Plaintiff, South Central Bell Company, brings an action for declaratory and injunctive relief against the defendants, the Louisiana Public Service Commission and its individual commissioners, Thomas E. Powell, George J. Ackel, Ed Kennon, Louis Lambert and John G. Schwegmann, Jr. This matter is before the court on plaintiff's motion for a preliminary injunction. A hearing was held and the motion was submitted upon the submission of briefs. The court has subject jurisdiction under 28 U.S.C. § 1337.

FINDINGS OF FACT

1) Defendant, Louisiana Public Service Commission, is authorized by the laws of the state of Louisiana to regulate the intrastate rates, services, facilities and practices of South Central Bell Company insofar as that company is engaged in the business of supplying utility service to the public with the state of Louisiana.

2) On May 3, 1982, South Central Bell filed tariff revisions with the Louisiana Public Service Commission seeking an increase of $238,600,000.00 in annual revenues in Docket No. U-15445.

3) As part of the justification for the increase, plaintiff relied upon the Federal Communications Commission's (FCC) 1980 adoption of the Remaining Life and Straight Line Equal Life Group depreciation method in the Order released December 5, 1980, in Docket 20188, 83 F.C.C.2d 267 (1980), on reconsideration 87 F.C.C.2d 916 (1981). Plaintiff further relied upon the F.C.C. Order which requires the expensing of station connection released March 30, 1981, CC Docket No. 79-105, 85 F.C.C.2d 818 (1981).

4) On December 30, 1982, the F.C.C. issued an Order in Docket No. 82-576 which prescribed depreciation methods for South Central Bell equipment. The Louisiana Public Service Commission had an opportunity to participate in the hearings which culminated in the formation of the Order.

5) No appeal was filed from the December 30, 1982 Order and it is now final.

6) On January 6, 1983, the F.C.C. released its

Memorandum Opinion and Order adopted December 22, 1982, in CC Docket No. 79-105 which held that the F.C.C.'s depreciation methods preempt inconsistent state depreciation methods and rates. The Order also contained a provision requiring the Secretary of the F.C.C. to serve a copy of the Order on each state commission. According to William J. Tricarico, Secretary of the F.C.C., members of his staff mailed copies of the Order to all state public service commissions, including defendant, on or about January 7, 1983.

7) The Order was published in the Federal Register on January 19, 1983.

8) The testimony of Bruce Louiselle indicates that the Louisiana Public Service Commission had actual knowledge of the F.C.C.'s January 6, 1983 Order and the commission so concedes.

9) The Louisiana Public Service Commission continues to prescribe methods of depreciation other than those prescribed by the F.C.C., the straight line equal life group method. The last official order of the Louisiana Public Service Commission which addresses regulation of depreciation rates for plaintiff's equipment in Louisiana is dated June 30, 1981. It states: "Depreciation rates for imbedded terminal equipment, and all other equipment historically regulated in the intrastate jurisdiction, will be set according to policies approved in this State. They will not be established to further a policy of 'deregulation' of the F.C.C." The Order expresses the intent of the Commission in that it provides that the Order is "issued to set forth the scope of the regulatory authority over telephone tariffs that is exercised, and will continue to be exercised absent a contrary and authoritative judicial order by the Louisiana Public Service Commission."

10) The Louisiana Public Service Commission requires plaintiff to employ a depreciation technique known as Whole Life straight line depreciation. When an asset is acquired, a fixed life is assigned to it and the costs of depreciation are allocated over the assigned period regardless of the actual life of the asset. Recovery of these costs occurs at a slow rate at the beginning of the life of the asset.

11) The technique now prescribed by the F.C.C., the remaining life method, evaluates the remaining life of the assets at specified intervals and the remaining value of the asset is depreciated over its remaining life, regardless of the length of its actual life to date.

12) The remaining life method results in greater recovery of costs early in the life of the asset. The same is true of the straight line equal life group technique.

13) The actual expenses of plaintiff, including costs associated with depreciation of assets, are one factor evaluated by the Louisiana Public Service Commission in determining what rates South Central Bell will be allowed to charge.

14) If depreciation of plaintiff's assets is computed according to the method prescribed by the F.C.C. rather than according to the technique employed by the Louisiana Public Service Commission, its expenses will be substantially increased.

15) The Louisiana Public Service Commission also requires that station connection costs be capitalized, rather than expensed, as required by the F.C.C. Expensing Order.

16) The use of the F.C.C. mandated accounting procedures will result in accelerated depreciation and increased expenses which require an increase in rates. The need for additional revenue originates in the settlement of the government's antitrust action against American Telephone & Telegraph Co. and is one of the "benefits" to the public of the break-up of the Bell System into separate entities.

17) Plaintiff's need for additional cash flow is indisputable and delay in switching to F.C.C. mandated accounting procedures will deny plaintiff the additional cash flow required, thus impairing its financial position and cash flow which it is presently losing because of the actions of the Louisiana Public Service Commission. Such losses are irretrievably lost, even though a rate increase should be granted in the future.

CONCLUSIONS OF LAW

1) The terms of the Federal Communications Act of 1934 expressly grant to the F.C.C. the authority to enter orders effectuating the provisions of the Act, 47 U.S.C. §§ 151, 152(a), 154(i). In the exercise of its authority, the F.C.C. has broad discretionary power, see e.g. *United States v. Southwestern Cable Company* 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968).

2) In keeping with its statutory grant of power, the F.C.C. has held that, under Section 220(b) of the Act, states may not prescribe depreciation rates which are inconsistent with the depreciation rates and policies mandated by the F.C.C., see Memorandum Opinion and Order, CC Docket No. 79-105, January 6, 1983. 48 Fed.Reg. 2324 (1983).

3) The Supremacy Clause of the United States Constitution, Article XI, cl. 2, dictates that federal laws preempt those enacted by the states when the latter are in conflict with the purposes of Congress, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963).

4) The January 6, 1983 Memorandum Opinion and Order carefully considers the impact of inconsistent state imposed methods of depreciation computation on intrastate communications and concludes that their continued use would frustrate the objectives of Congress expressed in the Federal Communications Act. The order clearly states: "...[W]e find it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communication Act and are accordingly void." 48 Fed.Reg. at 2330 (1983) and: "...Since the depreciation method utilized is a material part in determining the rate to be applied, state commissions are also precluded from departing from the depreciation methods prescribed by the Commission. Thus, the *Expensing Order* is binding upon state commissions and they must expense additions to inside wiring in accordance with the plan established therein..." Id., at 2230, and "...Accordingly, we find that this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rates." (Id. at 2331).

5) The rulings and orders of administrative agencies carry the full force of federal law and are accorded the same preemptive effect as federal statutes, *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982).

6) The Louisiana Public Service Commission continues to require the plaintiff to employ methods of computing depreciation which conflict with those specified by the F.C.C. and, in so doing, are in violation of federal law.

7) Plaintiff asks the court to grant injunctive relief in accordance with the provisions of 47 U.S.C. § 401(b) which allows any party, injured by another person who neglects to comply with any order of the Commission, to ask the court for enforcement of the order through issuance of an injunction.

8)After a hearing, the court "shall enforce obedience to such order by a writ of injunction..." if the court determines that the order was "regularly made and duly served" and that the defendant is acting in violation of the order. 47 U.S.C. § 401(b).

9) The first of the statutory requirements of § 401(b) has already been met, the defendants are clearly acting in defiance of the F.C.C.'s January 6, 1983 Order.

10) Whether the order was regularly made and duly served is an issue which has spawned much dissent between the parties. Defendants admit that the Louisiana Commission actually received a copy of the order but insist that they are entitled to personal service of the order as a prerequisite to being restrained for non-compliance with its terms. Since the Act itself does not specify the manner in which service is to be made, defendants reason that the provisions of the Federal Rules of Civil Procedure, and consequently the Louisiana Code of Civil Procedure, are applicable. Apparently, no other court has yet been called upon to construe these terms. Nonetheless, defendant's argument cannot succeed. The scope of the Federal Rules

of Civil Procedure are expressed in Rule 1, which states that the Rules govern all civil actions in the district courts of the United States. Obviously, proceedings before the F.C.C. are not included in this category. Such a conclusion is further supported by the provisions of 47 U.S.C. § 154(j) which empower the F.C.C. to prescribe its own procedural regulations, *FCC v. Schreiber*, 381 U.S. 279, 85 S.Ct. 1459, 14 L.Ed.2d 383 (1965).

11) In the present case the applicable procedural regulations are contained in 47 C.F.R. § 0.445(a)—0.445(e). § 0.445(a) states that "All opinions and orders of the Commission...are mailed to the parties and, as part of the record, are available for inspection...." Subsection (c) further explains that "All rulemaking documents are published in the Federal Register." The effect of compliance with the provisions listed above is described in §0.445(e), which states, inter alia, "If the documents described in paragraphs (a)-(d) of this section are published in the Federal Register, the F.C.C. Reports or Pike and Fischer Radio Regulations, they may be relied upon, used or cited as precedent, by the Commission or private parties in any matter. If they are not so published, they may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question or by such persons against the Commission. No person is expected to comply with any requirement or policy of the Commission unless he has actual notice of that requirement or policy or unless a document stating it has been provided in this paragraph."

12) There is absolutely no evidence in the record to indicate that the F.C.C. in any way deviated from the regulations cited above. There is apparently no dispute that the parties to the F.C.C. proceeding which led to

issuance of the January 6, 1983 Order were served in accordance with 47 C.F.R. § 0.445(a). Although the pertinent regulations do not require service of the order on one not a party to the proceeding, the Secretary of the F.C.C. nonetheless served the Louisiana Public Service in keeping with the standard practices followed by the F.C.C. In addition to the fact that the Louisiana Public Service Commission had actual knowledge of the Order, it was also published in the Federal Register. Under these circumstances, the court must conclude that the defendants have failed to rebut the presumption of correctness which attaches to the acts of government officials, *FCC v. Schreiber,* 381 U.S. 279, 85 S.Ct. 1459, 14 L.Ed.2d 383 (1965); *Environment Defense Fund, Inc. v. Alexander,* 614 F.2d 474 (5th Cir.1980). Accordingly, the court holds that the F.C.C. acted in accordance with the law an the Order, dated January 6, 1983, CC Docket No. 79-105 was regularly made and duly served for purposes of 47 U.S.C. § 401(b).

13) Finally, the court is called upon to decide what manner of harm must be demonstrated before plaintiff is entitled to invoke the protection of §401(b). Under the terms of the statute itself, only a person injured by the defendant's non-compliance with an F.C.C. order may seek injunctive relief. The question is whether the plaintiff must show mere injury or meet the traditional equitable requirement of irreparable injury, *see Canal Authority v. Callaway,* 489 F.2d 567 (5th Cir.1974). Generally, when the injunction is the "creature of the statute," no showing of irreparable injury is required once the statutory requirements have been met, see e.g. *Hecht v. Bowles,* 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944), *SEC v. Mize,* 615 F.2d 1046 (5th Cir.1980); *UV Industries v. Posner,* 466 F.Supp. 1251 (D.Me.1979).

14) As noted earlier, the actions of the Louisiana Public Service Commission have clearly caused injury to plaintiff. By failing to employ the F.C.C.'s method of computing the rate of depreciation of plaintiff's assets, the defendants were able to justify the decision to deny plaintiff's request for a rate increase. Had F.C.C. policies and rates been used, the substantial increase in expenses reflected would have required that a rate increase be granted in keeping with the policies expressed in the January 6, 1983 Order of the F.C.C. Any rate increase denied in the present cannot be recovered in the future. Under the terms of 401(b), the court is convinced that plaintiff has shown sufficient injury to warrant the issuance of an injunction, as was each of the other district courts to which this issue has been presented. *Southwestern Bell Telephone Comopany v. The State Corporation Commission of the State of Kansas, et al*, C.A. No. 83-7090, (D.C.Kan.1983); *Pacific Northwest Bell Telephone Company v. Washington Utilities and Transportation Commission, et al*, 565 F.Supp. 17 (D.C.Wash.1983); *The Chesapeake and Potomac Company of Maryland v. Public Service Commission of Maryland*, 560 F.Supp. 844 (D.C.Md.1983).

15) Defendant protests that the F.C.C. had suddenly reversed its posture of 40 years and that this court should consider the impact of any rate increase upon the public, especially upon the poor. The answer to defendant's assertion is that it is beyond the power of this court to review the propriety or legality of an order of the Federal Communications Commission since the Congress has vested that jurisdiction only in the court of appeals. 47 U.S.C. § 402; 28 U.S.C. 2342(1).

16) Defendant also asserts that the Johnson Act, 28

U.S.C. § 1342 preludes the court from enjoining it. The Johnson Act provides that: "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order effecting rates chargeable by a public utility and made a State administrative agency or a rate-making body of a State political subdivision, where: (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and (2) The order does not interfere with interstate commerce; and (3) The order has been made after reasonable notice and hearing; and (4) A plain, speedy and efficient remedy may be had in the Courts of such a State." The Johnson Act applies only if *all four* of its enumerated factors exist. *DeKalb County v. Southern Bell Tel. & Tel. Co.*, 358 F.Supp. 498 (N.D.Ga.1972), aff'd 478 F.2d 700 (5th Cir.1973). Here the very first requisite for Johnson Act application is not met. Plaintiff asserts jurisdiction under Section 401(b) of the Communications Act and the preemptive effect of the F.C.C.'s order, not upon any alleged repugnance of the defendant's action to the Constitution. *Chesapeake and Potomac Tel. Co. of Md. v. Public Service Comm. of Md., supra.* Thus the Johnson Act does not bar injunctive relief. Likewise, where the Congress specifically authorizes injunctive relief by a federal court notions of comity between federal and state systems are no longer applicable.

17) Finally, defendant argues that in considering plaintiff's chances for success upon the merits we must consider the circumstances surrounding the F.C.C.'s actions and whether its orders will ultimately be upheld by the courts to which the Congress has entrusted review of the orders. That is simply a request to do indirectly that which the court may not do directly—review action of the F.C.C.

18) The court is not convinced, however, that the scope of the injunction should be as broad as plaintiff has requested. Plaintiff properly asks the court to enjoin the defendants from employing any methods of depreciation which are not in accordance with the January 6, 1983 and December 22, 1982 Orders of the F.C.C. In addition, plaintiff requests that the Louisiana Public Service Commission also be commanded to "issue appropriate orders within seven days permitting South Central Bell to implement, subject to refund with legal interest thereon, tariffs in accordance with the depreciation rates and methods prescribed by the F.C.C." Were such an order to issue, the court would in effect, become directly involved in the rate making process. Indeed, the January 6, 1983 Memorandum Opinion and order clearly recognizes that intrastate rate making is still within the exclusive province of the states. 47 U.S.C. § 152(b) p. 12, paragraph 30. Plaintiff insists that defendant's past activities show that it will not in good faith comply with the order of this court requiring that it follow F.C.C. policies and that the court should state precisely the rate increase to be granted—as the court did in *Pacific Northwest Bell Tel. & Tel. Co. v. Trans. Comm., supra.* While depreciation schedules are an important factor in rate making, they are only one factor among many and this court is not willing to assume in advance that the Louisiana Public Service Commission will not comply, in good faith with the orders of the court. We will follow the procedure of Judge Northrop in the Maryland case and require the defendant to set new rates within ten days utilizing F.C.C. policies and rates.

ON MOTION FOR NEW TRIAL

This matter is before the court upon a motion for new trial filed on behalf of defendant, the Louisiana Public

Service Commission, and upon a motion to modify the order for preliminary injunction which the court previously entered and alternatively for a rule to show cause why the defendant should not be held in contempt, filed on behalf of plaintiff, South Central Bell Telephone Company. This action was initiated by South Central Bell under Section 401(b) of the Federal Communications Act of 1934, 47 U.S.C. § 401(b), seeking injunctive relief requiring the Public Service Commission to adopt accounting procedures which have been prescribed by the Federal Communications Commission for the purpose of fixing intrastate telephone rates. The court heard a motion for preliminary injunction and on June 27, 1983, entered findings of fact and conclusions of law and issued a preliminary injunction requiring that the Public Service Commission abide by the F.C.C. order regarding depreciation rates and methodologies and to "issue an order which provides for the collection of rates by plaintiff sufficient to recover the intrastate revenue requirement resulting from the F.C.C. prescribed depreciation rates and methodologies." Establishment of a refund procedure was directed in case plaintiff should not prevail on the merits of the action. Pursuant to that order, the Public Service Commission on July 7, 1983, issued an order which: (1) reduced South Central Bell's fair rate of return on equity from 13.5% which it had previously set, to 12% and (2) authorized an increase in revenues in the amount of $12,700,000.00.

These motions were then filed and the court heard both motions on July 29, 1983, at the conclusion of which oral findings were made. The motion of the Public Service Commission for new trial was denied and the motion of plaintiff to modify the injunctive order was granted. The Public Service Commission was ordered to increase telephone revenues by an amount sufficient to constitute a total increase in the amount of $40,506,000.00.

This memorandum opinion will serve as further findings and conclusions of law for the court's ruling of July 29, 1983.

The court granted the motion of the Federal Communications Commission to file a memorandum, amicus curiae, in this matter and the court has considered that memorandum along with the other briefs.

I. *Motion for New Trial*

The Public Service Commission's motion for new trial is principally based upon a re-examination of § 401(b) of the Communications Act precipitated by the decision to deny a telephone company request for a temporary restraining order in a similar proceeding pending in the United States District Court for the District of Maine (Civil Action 83-0166-P, New England Telephone and Telegraph Company v. Public Utilities Commission of Maine, et al, unreported). This court expressed to counsel its concern that sufficient consideration had not been given to the proper interpretation of § 401(b) at the time of issuance of the preliminary injunction and specifically requested that counsel brief the question whether that provision authorizes enforcement by a private party of an F.C.C. order such as that here involved. Multiple briefs have been filed by both sides.

On December 22, 1982, the F.C.C. adopted a "memorandum opinion and order," released January 3, 1983, F.C.C. 82-581, Mimco 32609. The F.C.C. had previously adopted revisions in depreciation methods and an order requiring expensing, instead of capitalizing, "inside wiring" costs of making station connections. In its January 3, 1983 order, the F.C.C., reversing forty years of its own precedent, as counsel for the Public Service Commission has pointed out, held

that under the provisions of the Communications Act, all state regulatory depreciation rules in conflict with F.C.C., methodologies are pre-empted by the F.C.C. orders. The Public Service Commission rules do not comply with F.C.C. accounting procedures and the Public Service Commission has refused to permit South Central Bell to utilize F.C.C. procedures for intrastate operations.

Telephone companies are subject to regulation both by state commissions for intrastate operations and the Federal Communications Commission for interstate operations.

The F.C.C.'s change in accounting procedures converts "inside wiring" costs of making telephone connections to residences and businesses from a depreciable capital asset to an expense and increases the amounts allowed as depreciation of telephone company plant and equipment. The practical effect of these changes is to increase the operating expenses which the telephone company is allowed to charge off, thus generating the need for additional revenues to cover operating costs. The Public Service Commission does not agree that these changes are desirable, particularly because institution of these changes and the related increased operating costs mandates an increase in revenues, hence an increase in the cost to telephone subscribers. This court is not, and can not become involved in the question of whether the F.C.C.'s approach is correct. The Congress has specifically provided that no district court has authority to review or otherwise determine the validity of an F.C.C. order; the courts of appeals have exclusive jurisdiction to review final orders of the F.C.C.. 47 U.S.C. § 402; 28 U.S.C. § 2342[1]. The parties have informed the court that the validity of the F.C.C. order is on review at this time in the United States Court

Appeals for the Fourth Circuit; this court, however, can entertain no challenge to that order and must accept and apply it.

No one idsputes that this is a final order of the F.C.C.—the issue is whether it may be enforced by a private party under § 401(b) against the Public Service Commission. That section reads, in pertinent part as follows:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money ... the Commission or any party injured thereby, or the United States ... may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process...

Counsel for the Public Service Commission concedes in brief and oral argument that the F.C.C. could issue an order specifically telling all state regulatory agencies to comply with the revised accounting procedures and that such an order would be enforceable under § 401(b) even though the Public Service Commission was not specifically named therein and had not participated in the administrative proceedings. Counsel argues, however, that the January 3, 1983 F.C.C. order is merely a legal opinion issued by the F.C.C. interpreting the provisions of the Communications Act of 1934, that it does not specifically order the state commissions to do anything and, as such, the order is not enforceable under § 401(b), although it might be enforceable by the United States at the request of the

F.C.C. under § 401(a). The narrow issue then is whether this particular F.C.C. order, by its terms, requires that all state regulatory bodies comply and adopt the F.C.C. accounting procedures.

The January 3, 1983 order does contain an extensive discussion of what the F.C.C. considers to be the applicable law and does conclude that the F.C.C.'s prior construction of the Communications Act was in error. Under the "declaratory ruling" portion of the order however, the F.C.C. states:

> " ... The purpose of declaratory rulings is to give guidance to affected persons in areas where uncertainty or confusion exists... In this case, it appears necessary to issue such a ruling to *clarify for the state commissions* and the carriers the effect of our depreciation prescriptions... Thus, we find it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communications Act and are accordingly void..." (January 6, 1983 order, paragraph 43, page 16 emphasis supplied).

This court can construe the above quoted language in no other fashion than as a direct order for the guidance of state commissions, specifically declaring that inconsistent state prescribed depreciation rates are void. The January 3, 1983 order closes with four "ordering" clauses, one of which directs the secretary to cause a copy to be served on each state commission. There is no "ordering clause" specifically directing each state regulatory agency to comply with the provisions of the F.C.C. order, but this court concludes that the order nevertheless is plainly directed to all state regulatory bodies and plainly declares that their depreciation procedures must comply with

F.C.C. procedures. It is thus an "order of the Commission other than for the payment of money" and may be enforced under § 401(b) against any person who "fails or neglects to obey" by any party injured thereby. This court has previously determined that the F.C.C. order was "regularly made and duly served" and that the Public Service Commission, by failing to comply with it has failed or neglected to obey it and thus is "in disobedience of the same." Under these circumstances, the Congress has stipulated that "the court shall enforce obedience to such order by a writ of injunction." For these reasons, the court concludes that the preliminary injunction previously issued herein was properly issued under § 401(b) and the motion for new trial on behalf of the Public Service Commission is denied.

II. *The Motion to Modify Order for Preliminary Injunction*

In its prior rulings in this case, this court has pointed out that it will not become involved in the rate making process and that intrastate rate making is still within the exclusvie province of the states. 47 U.S.C. § 152(b). Accordingly, the court in its original injunctive order did not direct any specific rate increase but simply ordered the Public Service Commission to apply the F.C.C. mandated accounting procedures and to issue an order "which provides for the collection of rates by plaintiff sufficient to recover the intrastate revenue requirement resulting from the F.C.C.-prescribed depreciation rates and methodologies."

The last rate increase granted to South Central Bell by the Public Service Commission was in 1981. In the course of that proceeding, the Public Service Commission, after receiving extensive testimony fixed a fair rate of return on equity at 13.5%. In 1982 South Central Bell filed

another request for increase in rates in the amount of $238,000,000.00. During the course of that proceeding, the Public Service Commission determined that application of the F.C.C. mandated accounting procedures would increase South Central Bell's expense level by $40,506,000.00. The Public Service Commission declined to allow South Central Bell to utilize the F.C.C. procedures for intrastate operations and denied the request for increased rates on May 19, 1983.

In its July 7, 1983 order, the Public Service Commission confirms that application of the F.C.C. depreciation rates would cause South Central Bell's intrastate operating costs to increase in the amount of $40,506,000.00. In response to the preliminary injunction issued June 27, 1983 the Public Service Commission did not order an increase in revenues sufficient to cover the increase in expenses. Although no evidence was received upon any matter, the Public Service Commission simply reduced South Central Bell's fair rate of return on equity from the 13.5% previously fixed by the Public Service Commission itself to 12%. This action reduced the increase in revenues required by the company from $40,506,000.00 to $12,700,000.00. This determination was made without the benefit of receiving any evidence and with no attempt to justify a revision in the previously established rate of return.

In the July 7, 1983 order, the Public Service Commission declares that because no increase in revenues was required, the May 19, 1983 order did not determine a rate of return. This court finds that the May 19, 1983 order did not refuse the company's request for South Central Bell's request for an increase predicated upon reduction in the rate of return. On the contrary, the May 19, 1983 order specifically states, "Since the Company has earned a rate

of return comparable to that found to be reasonable by the Commission in the last rate proceeding, we find no justification for an increase in rates at this time." That finding is, very clearly a reiteration in 1983 that the rate of return established in 1981 is still in effect. Since the Commission received no evidence on this or any other subject in connection with issuing its July 7, 1983 order, the Commission had absolutely no justification for failing to order an increase in revenues sufficient to cover the increased operating costs of the company. This court will not become involved in the determination of the fair rate of return on equity which South Central Bell should have. That is a matter for the Public Service Commission, predicated upon proper and sufficient evidence, and, upon review, by the courts of Louisiana.

The Public Service Commission, here has not complied with the order of this court. The Public Service Commission itself has determined that there is an increase in operating expenses of $40,506,000.00 and, unless there are reasonable and proper adjustments to be made, that increase in operating costs mandates an equivalent increase in revenues. Adjusting fair return on equity downward, in the absence of evidence justifying such an adjustment, was arbitrary and capricious—a simple exercise in arit! metic designed to minimize the increase in telephone rates. The Public Service Commission here has declined to perform its rate making duties and its response to the court's preliminary injunction leaves the court no alternative but to accept the Commission's finding that South Central Bell has increased operating costs of $40,506,000.00. Having accepted that determination, the court must require the Public Service Commission to "issue an order which provides for the collection of rates by plaintiff sufficient to recover the intrasate revenue requirement resulting from

the F.C.C.-prescribed depreciation rates and methodologies." That increase has been determined by the Public Service Commission itself to be $40,506,000.00 and, since this court will not engage in rate making, that is the increase which the Public Service Commission must authorize.

For these reasons, the motion to modify the preliminary injunction is hereby GRANTED and the Public Service Commission will be ordered to grant an increase in revenues to South Central Bell which will cover South Central Bell's increase in operating costs of $40,506,000.00.

84-870

NO.

Office-Supreme Court, U.S.
FILED
NOV 30 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1984

LOUISIANA PUBLIC SERVICE COMMISSION, THOMAS E. POWELL, GEORGE J. ACKEL, ED KENNON, LOUIS LAMBERT AND JOHN F. SCHWEGMANN,

Appellants

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Appellee

On Appeal from the United States Court of Appeals for the Fifth Circuit

APPENDIX TO JURISDICTIONAL STATEMENT VOL. II—APPENDIX A (Continued) — APPENDIX E

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A-57

Before the

Federal Communications Commission

Washington, D.C. 20554

CC Docket No. 79-105
RM-3017

In the Matter of

Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission's Rules and Regulations with respect to accounting for station connections, optional payment plan revenues and customer provided equipment and sale of terminal equipment.

Petition for Declaratory Ruling on Question of Federal Preemption Involving Order Of the Public Utilities Commission of Ohio in Conflict with (i) FCC Prescriptions Under Section 220 of the Communications Act and (ii) Established FCC Policies.

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 1982 Released: January 6, 1983

BY THE COMMISSION: COMMISSIONER FOGARTY ISSUING A SEPARATE STATEMENT.

1. The Commission has before it a Petition for Reconsideration filed on June 7, 1982, by the American Telephone and Telegraph Company, on behalf of itself and the associated Bell System Operating Companies (AT&T). AT&T seeks reconsideration of the Commission's decision

in *Amendment of Part 31*, 89 FCC 2d 1094 (1982) (hereinafter cited as *Preemption Order*), in which the Commission determined that Sections 220(a) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. 220(a) and 220(b), did not preempt state commissions from applying different accounting and depreciation procedures for purposes of intrastate ratemaking proceedings.[1] The *Preemption Order* was a reconsideration of *Amendment of Part 31*, 85 FCC 2d 818 (1981) (hereinafter cited as *Expensing Order*).

2. The Commission also has before it a Petition for Declaratory Ruling filed on June 7, 1982, by General Telephone Company of Ohio (GTE of Ohio). This petition requests that the Commission preempt an order of the Public Utilities Commission of Ohio (Ohio) that denied GTE of Ohio the same depreciation rates for intrastate purposes as had been prescribed by this Commission. GTE of Ohio contends that Section 220(b) established the rate prescribed by the Commission as the only depreciation rate the company could utilize.

3. The Commission established a joint reply period for the two petitions, utilizing the pleading cycle for comments in response to the Petition for Reconsideration, and allowed parties to cross-reference their pleadings where appropriate. In addition to pleadings filed by the petitioners and the GTE parties, comments or reply comments were

[1] On June 8, 1982, GTE Service Corporation, on behalf of itself, United Telephone System, Inc., and Continental Telecom, Inc. (hereinafter referred to as GTE), filed a Petition for Clarification of the Commission's *Preemption Order*. This petition was dismissed as untimely. *Amendment of Part 31*, Mimeo No. 4766 (released June 24, 1982). However, the Commission stated that it would consider the substance of the petition in connection with AT&T's petition.

filed by the Arkansas Public Service Commission (Arkansas), Ohio, the People of the State of California and the Public Utilities Commission of the State of California (California), the Virginia State Corporation Commission (Virginia), the National Association of Regulatory Utility Commissioners (NARUC), the United States Independent Telephone Association (USITA), the Office of Consumers' Counsel, State of Ohio (Consumers' Counsel), the United Telephone System Inc. and the Idaho Public Utilities Commission (Idaho). A summary of the comments is contained in Appendix A. Below we consider the issues raised on reconsideration, after which we shall consider the question presented by GTE of Ohio's Petition for Declaratory Ruling.

I. Background

4. In *Docket No. 19129*, 64 FCC 2d 1, 54-56 (1977), we concluded that it would be desirable to have the causative rate payer bear the costs associated with station connections. We directed AT&T to file a plan for accomplishing this objective. Following AT&T's submission we initiated this proceeding, albeit with a somewhat different approach for modifying the accounting for station connections than proposed by AT&T.

5. After reviewing the comments, we concluded that the drop, block and protector portion of station connections should not be included in any accounting or regulatory revisions. We also concluded that our objective of placing the costs of station connections on the cost causative customer could not be achieved by means of an accounting change alone. This is so because costs associated with the provision of inside wiring must be apportioned between the federal and state jurisdictions as long

as inside wiring is provided as a tariffed service subject to dual jurisdiction. Complete unbundling could be achieved by requiring inside wiring to be provided on a detariffed basis, as was done with customer premises equipment. Accordingly, we initiated a further inquiry to explore the detariffing concept further, *Amendment of Part 31*, 86 FCC 2d 885 (1981).

6. Nevertheless, we concluded that changes in accounting and depreciation procedures that would begin expensing the inside wiring portion of the station connection account would be in the public interest, and would facilitate the deregulation of the provision of inside wiring if the Commission should later decide to take that approach. The principal changes required that future costs of installing inside wiring and similar costs be included as an expense in Account 605, Repair of Station Equipment. Such costs were previously capitalized in Account 232, Station Connections. The expensing of these costs would be phased in over a four year period unless a carrier obtained state commission approval to expense one hundred percent immediately. The *Expensing Order* also required that the present net investment in inside wiring and the investment capitalized during the phase-in period be amortized over a ten year period. These expensing and amortization rules replaced the depreciation procedures that had previously applied to the inside wiring portion of the station connection account.

7. On reconsideration, we concluded that the *Expensing Order* was not intended to preempt state commissions from utilizing other depreciation or accounting procedures for intrastate ratemaking proceedings, unless such preemption occurs as a matter of law. Our discussion was based in part on an assumption that most or all of the state

commissions would follow our lead. We also indicated that Section 220 does not preclude state commissions from departing from accounting and depreciation rules prescribed by this Commission for purposes of regulating intrastate communications services. In reaching this conclusion, we reviewed Section 20(5), the Interstate Commerce Act predecessor of the accounting and depreciation provisions contained in Section 220. We concluded that nothing in the history of Section 20(5) provided any indication of whether that provision had been intended to preempt state commissions from prescribing divergent depreciation rates when the Interstate Commerce Commission (ICC) had prescribed a rate. We stated:

> [i]nasmuch as Section 20 had never been construed to restrict state commissions from requiring carriers to keep additional records for purposes of intrastate ratemaking and court decisions in analagous contexts did not adopt an expansive interpretation of that provision, the reenactment of that language should not be interpreted to restrict state commissions from keeping such additional records in the absence of clear evidence that the 1934 Congress intended to produce that result.

Preemption Order, supra at 1102.

8. We also reviewed the legislative history of the Communications Act and concluded that Congress had been uncertain of the preemptive effect of reenacting the Interstate Commerce Act language and that it apparently did not want to resolve the question at that time. We concluded that Congress had been attempting to obtain as much uniformity as possible without coercing any state commission to use ratemaking methods which it might find

unacceptable. We found that we had proceeded in a manner consistent with this purpose for nearly four decades, noting that we had recognized divergent practices by state commissions from time-to-time. The language of Section 2(b)(1) was found to support the interpretation that state commissions are not precluded from applying different accounting and depreciation procedures from this Commission. The *Preemption Order* concluded by finding that nothing in the Act precluded us from preempting state commission actions that might interfere with or tend to frustrate policies or rules we have adopted to carry out statutory objectives with respect to interstate or foreign communications, but we also found that federal regulation would not be frustrated if carriers maintain additional records for intrastate ratemaking purposes.

II. Discussion

9. The question presented in the reconsideration petition is a clearly delineated controversy over whether Section 220(b) preempts state depreciation prescriptions that are inconsistent with the rates prescribed for classes of property by this Commission, or, whether Section 2(b)(1) or Section 221(b) reserve to the states the right to prescribe their own depreciation rates for intrastate regulatory purposes. Alternatively, it is argued that the Commission should preempt inconsistent state depreciation rates pursuant to its authority to preempt state actions which would frustrate or interfere with the accomplishment of federal objectives. *See North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (hereinafter cited as *NCUC I*). The *Preemption Order* was the first time the Commission had squarely addressed the preemptive effect of a prescribed depreciation rate, despite having prescribed rates for more than thirty

years. No federal court has addressed the question of the preemptive effect of a Commission prescribed depreciation rate.[2]

10. It is argued that the Commission erred in the earlier decision by concentrating on Sections 220(a) and 220(g) rather than properly analyzing Section 220(b), the provision dealing directly with depreciation. A careful review of AT&T's and GTE's pleadings and a thorough reevaluation of the entire question of the Commission's depreciation jurisdiction leads to the conclusion that the evaluation in the *Preemption Order* did not sufficiently consider the effect of Section 220(b). Accordingly, we shall undertake to evaluate anew the scope of the Commission's jurisdiction under Section 220(b).

11. Before turning to the analysis of the statutory provisions, it is necessary to understand the relationship between capitalizing and expensing a transaction or economic event. When an event is capitalized, its cost is recorded on the company's books to be recovered over some future period through depreciation charges to operating expense. Depreciation as used here is an accounting convention for allocatively spreading the original cost, less net salvage, over the useful life of a capital asset. Thus, for there to be depreciation there must be costs that are to be recovered over more than one accounting period. However, when the decision to expense is made, all costs are to be recovered at one time. Thus, the decision to

[2] The United States Supreme Court has held that state commissions may prescribe depreciation rates where the empowered federal commission has not prescribed rates. *Northwestern Bell Telephone Co. v. Nebraska State Railway Comm.*, 297 U.S. 471 (1936). The Court specifically reserved judgment on the effect of prescribed rates by the federal commission.

expense is a determination that there is no category of asset for which depreciation expense will be allowed. It is therefore clear that the decision to commence expensing the inside wiring portion of station connections involves questions of depreciation policy.

12. The law is clear that federal regulation should not be presumed to preempt state regulations without clear evidence of either congressional design to preempt the field or that state regulatory activities would obstruct the accomplishment and execution of the full purposes and objectives of Congress. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963), *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Our review reveals that both criteria are satisfied in this case. In reaching this conclusion we analyzed the language of Section 220, the legislative history, relevant court cases, and our regulatory objectives.

A. *Statutory Language*

13. The Commission's express jurisdiction with respect to depreciation is set forth in Section 220(b). That section provides:

> The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers, shall not, after the Commission has prescribed the classes of property for which depreciation charges may be

> included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

14. The plain language of the statute is express and unequivocal. Section 220(b) says the Commission "shall" make depreciation prescriptions, and that carriers "shall not" charge depreciation different than that prescribed by the Commission. That this preempts inconsistent state action is further indicated in Section 220(h) which gives the Commission discretion to "except" carriers from the requirements of Section 220 "where such carriers are subject to state commission regulation."

15. The requirement of Section 220(i) that states be given an opportunity to comment before the Commission prescribes "any requirements as to accounts, records and memoranda" is consistent with an interpretation that states are preeempted when the Commission has acted in the depreciation area. By providing that states be given notice, Congress ensure that state needs for accounts, records and memoranda brought to the Commission's attention would be considered. Such a procedure assures that the states' needs and legitimate interests are met.

16. In setting the duties of the Commission and the prohibitions on the carriers subject to the Act, Congress

spoke of depreciation in general terms without any attempt to make distinctions between either "intrastate" or "interstate" property. This is significant because when Congress wanted to make such distinctions in the Act it did so. See, *e.g.*, 47 U.S.C. 221(c) and (d), and 410(c). The fact that Congress did not make such a distinction here indicates that it intended no distinction.

17. Taken as a whole, the language of Section 220 appears clearly to preempt the states in connection with depreciation expense determinations and the related accounting. The language strongly implies that the states may not depart from depreciation rules prescribed by the FCC unless the Commission in its discretion allows them to do so. Otherwise, the federal statute would govern state depreciation practies in form only, allowing the states to treat substantive depreciation matters as they might choose. While that might be a plausible construction of Section 220, after full analysis we do not believe that Congress intended such a feeble gesture. There would be little purpose to require the carriers to keep all their books pursuant to an FCC prescription, and then allow the states to require the carriers to follow inconsistent depreciation practices. Instead, the language of the section and the comprehensive treatment given to this matter by the Congress demonstrate that more was intended. Accordingly, we find that the statutory language indicates that FCC depreciation prescriptions are to be followed in both the federal and state jurisdictions unless the FCC provides otherwise. As demonstrated below, this construction is also consistent with the legislative history.

B. *Legislative History*

18. In the *Preemption Order* we found that the

legislative history of Section 220 was inconclusive and at most indicated that Congress was "not sure" about the preemptive effect of the new legislation. 89 FCC 2d at 1106. However, the reconsideration petition and comments supporting it show that Congress believed that the language ultimately adopted would preempt the states from prescribing depreciation rates for subject carriers when the Commission had prescribed rates.

19. In our *Preemption Order*, we observed that Section 220 of the Communications Act had been adopted from Section 20 of the Interstate Commerce Act, and our review of the few ICC cases touching upon preemption did not reveal the ICC to have possessed the kind of broad preemptive power now urged by GTE and AT&T. However, after reviewing the pre-1934 cases again, we find that, while not dispositive, they lean more toward GTE and AT&T's views than against them.

20. The closest the ICC came to delineating its position on this matter came in *Depreciation Charges of Telephone Companies*, 118 I.C.C. 295, 332 (1926), where it said:

> It seems to be well established that where a local telephone company undertakes to originate or deliver toll messages, and most of them do so undertake, practically all of its property is open for use in interstate commerce and at any time may be so used. Under such circumstances, no doubt would seem to exist as to the power of Congress to regulate the accounting practices of such companies with respect to their property, including the accounting for depreciation.

In the *Preemption Order* we focused on the fact that the

ICC had not actually prescribed depreciation rates and thus there was uncertainty regarding the ICC's actual authority. However, after reviewing that case again we find that the better and more sensible interpretation is that if the ICC had prescribed depreciation rates, the state commissions would have been precluded from prescribing rates that diverged from those it prescribed. We cited *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 159 (1930), in the *Preemption Order* as supporting our conclusion that the ICC decision did not preempt the states. In that decision the Supreme Court held that absent ICC action prescribing depreciation rates, Section 20(5) did not preclude states from prescribing depreciation rates. Since the ICC proceeding did not actually prescribe depreciation rates, but only began a proceeding looking toward the ultimate prescription of depreciation rates, there were no depreciation rates prescribed that could have preempted state-prescribed depreciation rates. Thus *Smith* only stands for the proposition that until the ICC actually prescribed rates, there was no basis for preempting the states. It did not reach the question of whether Section 20(5) would preempt the states if the ICC prescribed depreciation rates.[3]

21. At the hearings pertaining to the Communications Act the then chairman of the ICC indicated his belief that the ICC depreciation rulings would govern both federal and state depreciation practices:

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[3] Similarly, *Interstate Commerce Commission v. Goodrich Transportation Co.*, 224 U.S. 194 (1912) and *Kansas City Southern Ry. Co. v. I.R.S.*, 52 F.2d 372 (8th Cir. 1931) do not appear to have any pertinance to the issue at hand. As noted in 89 FCC 2d at 1099, *Goodrich* did not raise any question with respect to the effect of ICC accounting rules upon activities not subject to ICC rate regulation. The *Kansas* holding simply reconciles two federal statutes, the Internal Revenue Code and the Interstate Commerce Act. It did not purport to establish new law on state preemption.

> Paragraph (j)...should be most carefully considered. It unquestionably directly conflicts with, and destroys the uniformity of systems of accounts and depreciation accounting required by the preceding provisions of the section. That is not true under the present law.[4]

22. Other witnesses who appeared at the hearing repeated the same view. See statements of Mrs. Gifford,[5] Mr. Benton,[6] and Dr. Irvin Stewart.[7]

23. The *Preemption Order* relied heavily on the "silence contained in the Congressional Reports," 89 FCC 2d 1105, in concluding that the legislative history did not support a finding that Section 220 was intended to preempt state commissions from prescribing their own depreciation rates for intrastate purposes. However, a reexamination of the legislative history in light of the comments on reconsideration indicates that the committee reports accompanying the bills did contain language indicating that the committees believed that the predecessor provision had preempted the states. The House Report, in discussing the Section 220(j) provision (which was not adopted) that would have reserved jurisdiction over depreciation rates to the states for purposes of intrastate ratemaking, stated that the provision was "responsive to the requests of the

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[4] Ltr. of F. McManamy, Hearings on S. 2910, p. 208.

[5] Hearings on H.R. 8301, pp. 191-192 (See 89 FCC 2d at 1105, fn.17). The *Preemption Order* had indicated that Mr. Gifford's preemption views were tentative. However, careful review of that testimony reveals that Mr. Gifford's uncertainty may have concerned the date Section 20(5) was enacted, not preemption.

[6] Hearings on S. 2910, 73rd Cong., 2d Sess., p. 181 (1943).

[7] Hearings on H.R. 8301, 73rd Cong., 2d Sess., p. 17 (1934).

State commissions that the present law be *changed so as to permit* those bodies to exercise, for State purposes, certain jurisdiction over...depreciation accounting."[8]

24. In remarks on the House floor, Representative Rayburn, Chairman, House Committee on Interstate and Foreign Commerce explained Section 220 of the proposed bill as follows:

> [p]aragraphs (a) to (g), relating to accounts records, memoranda, and depreciation, is based upon sections 20(5) to (8) of the Interstate Commerce Act with *changes necessary to permit State commissions to prescribe* the systems of accounts for the intrastate operation of carriers. Paragraphs (h) to (j) are new...*paragraph (j) removes any limitation upon the power of a State commission to prescribe, for the purposes of the exercise of its jurisdiction, rates of depreciation.* The last three paragraphs named were placed in the bill at the request of the State commissions which feel that their task of regulating intrastate communications will be greatly facilitated by the adoption of these paragraphs.[9]

25. The Senate version of Subsection (j) took a totally

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[8] H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 7 (1934) (emphasis added). The section (j) proposed by the House would have provided: "Nothing in this section shall (1) limit the power of a State commission to prescribe for the purposes of the exercise of its jurisdiction with respect to any carrier the percentage rate of depreciation to be charged to any class of property of such carrier, or the composite depreciation rate, for the purpose of determining charges, accounts, records, or practices; (2) relieve any carrier from keeping any accounts, records, or memoranda which may be required to be kept by any State commission in pursuance of authority granted under State Law." H.R. 8301, 73 Cong., 2d Sess. Section 220(i) (February 27, 1934).

[9] 78 Cong. Rec. 10314 (1934) (emphasis added).

different approach than the House version. It called "for investigation and report to Congres instead of immediately turning over these matters to the State." S. Rep. No. 781, 73rd Cong., 2d Sess. 5 (1934).[10] The version of Section 220(j) finally enacted was the result of agreement in the conference committee. The conferees agreed to adopt the House provisions as to Sections 220(h) and (i), but decided against the House Section 220(j) proposal to remove any limitation upon the power of states to prescribe rates of depreciation. Instead, Section 220(j) was modified along the lines of the Senate proposal to require the Commission to "investigate and report to Congress as to the need for legislation to define or further harmonize the powers of the Commission and of State commissions with respect to other matters to which this section relates." Conf. Comm. Rep. No. 1918, 73rd Cong., 2d Sess. 17 (1934). The obvious inference to be drawn is that the conferees were not prepared at that time to allow the states to prescribe depreciation rates different than those established at the federal level, but that matter might be considered later if the report required by Section 220(j) indicated it to be appropriate.

26. The hearing testimony and Committee reports therefore indicate that the language being recodified from Section 20(5) of the Interstate Commerce Act preempted

[10] The Senate version of Section 220(j) provided: "The Commission shall investigate and report to the Congress whether in its opinion legislation is desirable (1) authorizing the Commission to except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates; and (2) permitting the State commissions, in pursuance of authority granted under State Law, to prescribe their own percentage rates of depreciation or systems of accounts records, or memoranda to be kept by carriers." S. 3285, 73rd Cong., 2d Sess. Section 220(j) (March 28, 1934).

the state commissions' jurisdiction over depreciation. The rules of statutory construction provide that where Congress enacts a provision from an existing statute, it intends that the construction applicable to the existing provision apply as well to the new provision.[11] The legislative history thus supports the actual language of Section 220(b) and indicates that Congress intended to preempt state commission jurisdiction over depreciation rates for subject carriers when it recodified the language from the Interstate Commerce Act. Accordingly, we conclude that the analysis of the legislative history contained in the comments of AT&T and GTE accurately represents the intent of Congress and that the more persuasive reading of the legislative history supports the construction that Section 220(b) preempts inconsistent state action where the Commission has prescribed depreciation rates for a carrier.

C. *Administrative and Court Decisions*

27. The *Preemption Order* cited *Accounting Rules for Telephone Companies*, 203 ICC 13 (1934), as evidence that the FCC could not preempt state depreciation practices. There the ICC recognized that states might have additional accounting needs and indicated that it had permitted state-prescribed sub-accounts within the federally-required books of account. However, the adoption of a blanket subdivision rule does not lead to the conclusion that federally adopted accounting and depreciation rules are not preemptive. Rather, it reflects an awareness that state commissions may have special data requirements to properly

[11] Courts have given weight to interpretations of the Interstate Commerce Act in interpreting the Communications Act. See, *e.g.*, *American Telephone and Telegraph Company v. FCC*, 487 F.2d 865 (2d Cir. 1973).

administer their regulatory policies which may require additional detail beyond that prescribed by the federal agency. A subdivision rule, however, does not permit what is accounted for as an expense to be capitalized in the guise of subdividing an expense account. While we may allow subdivisions of accounts, we will not allow inconsistent accounting or depreciation methods unless such practices are otherwise consistent with the public interest. Any other policy would obliterate the prescriptive effect of our adoption of a uniform system of accounts.

28. In fact we have approved variations from the prescribed uniform system of accounts. For example, our rules give carriers blanket authority to subdivide certain prescribed accounts "provided such subdivisions do not impair the integrity of the accounts prescribed." 47 C.F.R. 31.01-2(d)(1). C.F. 31.01-2(f), authorizing carriers to subdivide accounts "in the manner ordered by any state commission having jurisdiction...." We also have approved state commission rate making treatment of plant under construction different from that adopted by us. See 89 FCC 2d at 1107.

29. There may well have been some instances of inconsistent state treatment of depreciation in the past. However, we do not seek controversy unless it is necessary to protect vital federal interests. Either such instances did not come to our attention or they may not have appeared threatening to federal interests.[12] In the past the communications marketplace was typified by monopoly conditions

[12] *Pacific Telephone and Telegraph Company v. California*, 401 P. 2d 353 (1965), was cited in the *Preemption Order* to support nonpreemption. However, the California Supreme Court did not analyze Section 220(b) or its legislative history and its determination is therefore unpersuasive.

and life and salvage factors underlying the state rates were generally very similar, if not identical, to those used by the Commission. In that environment it was not essential that the Commission assert all the authority granted it. See *Computer and Communications Industry Association v. FCC*, No. 80-1471 (D.C. Cir. November 12, 1982). As discussed, *infra.*, in the more competitive conditions prevailing today, the utilization of proper methods and rates is more critical if the proper incentives are to be created to insure that the marketplace will function efficiently to bring the benefits of the competition to the ratepayers of this country. Therefore, where it is necessary to protect important federal policies against frustration by inconsistent state actions, we will exercise the full breadth of our depreciation powers. *See* para. 14 above.

30. Nor is there any merit to the argument that federal preemption of depreciation practices constitutes intrastate ratemaking which might run afoul of 47 U.S.C. 152(b). Section 220(b) only prohibits the states from setting depreciation rates for telephone property inconsistent from those prescribed by the FCC. It does not require that any particular tariff for intrastate service be accepted by the state commissions. The setting of depreciation rates and classes of depreciable property only resolves a single issue impacting the ratemaking process. It does not restrict the state commission's broad discretion in setting charges for individual services. In any event, Section 2(b) of the Act, 47 U.S.C. 152(b), has a well defined purpose which would not be implicated here: "to restrain the Commission from interfering with those essentially local incidents and practices of common carriage by wire that do not substantially encroach upon the administration and development of the interstate telephone network." *NCUC I, supra* at 794 n.6. Here the setting of depreciation rates is not an essentially

local incident or practice and it has substantial effects upon the administration and development of the interstate telephone network.[13]

D. *Preemption Under Federal Supremacy*

31. Even if one were to assume that Section 220(b) did not automatically preempt the states whenever this Commission has acted, federal preemption of inconsistent state depreciation would be justified in this case to avoid frustration of validly adopted federal policies. The Fourth Circuit has stated:

> We have no doubt that the provisions of section 2(b) deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications. But beyond that, we are not persuaded that section 2(b) sanctions any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under sections 201 through 205.

NCUC I, supra at 793. To the same effect, see *Computer and Communications Industry Association v. FCC, supra* at 35.

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[13] Nor is federal preemption of depreciation practices inconsistent with 47 U.S.C. 221(b). Section 221(b) was intended to reserve state jurisdiction over exchange rates where exchange boundaries extend over two states. That provision was not intended to create new reservations to the states beyond that contained in Section 2(b) and the narrow circumstance encompassed by interstate exchanges. See *Computer and Communications Industry Association v. FCC, supra,* and *North Carolina Utilities Commission v. FCC,* 552 F.2d 1036, 1046 (4th Cir.1976), *cert. denied,* 434 U.S. 874 (1977) (hereinafter cited as *NCUC II*).

32. The D.C. Circuit recently addressed the preemption question, observing:

> We fail to see any distinction in this case between preemption principles applicable to state ratemaking authority and those applicable to other state powers. The operative principle [is that]...preemption of state tariffs on CPE is justified because state tariffs would interfere with the consumer's right to purchase CPE separately from transmission service and would thus frustrate the validly adopted federal policy.

Id. at 38. The court went on to find that conflicting state regulation may be preempted even though there is some indirect effect on state ratemaking discretion, noting:

> the Act itself does not distinguish between authority over rates and authority over other aspects of communications. Sections 2(a) and (b) of the Act allocated federal and state authority with regard to both "charges [and]...facilities." Therefore, conflicting federal and state regulations regarding dual use CPE are no more acceptable under the Act when equipment rates are involved, as here, than when interconnection policies are involved, as in the *NCUC* cases.

Id. at 38-39.

33. The provision for adequate capital recovery is important to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, world-wide wire and radio communication service with adequate facilities at reasonable charges...." 47 U.S.C. 151. State depreciation rate prescriptions that do not adequately provide for capital recovery in the competitive environment,

which constitutes this Commission's policy in those markets found capable of supporting competition, would frustrate the accomplishment of that policy and are preemptable by this Commission.

34. Over the past decade the Commission has embarked in several areas of telecommunications to pursue a policy of encouraging competition wherever the market conditions will support such a policy and produce benefits to the public interest. In *MTS-WATS Market Structure Inquiry*, 81 FCC 2d 177 (1980), the Commission opened the domestic MTS-WATS market to competitive entry, reserving the question of entry to Alaska to a later phase since concluded with the adoption of a similar open entry policy, *MTS-WATS Market Structure Inquiry*, FCC 82-515 (released November 30, 1982). In *Computer Inquiry II*, 77 FCC 2d 384 (1980), *recon.*, 84 FCC 2d 50 (1980), *recon.*, 88 FCC 2d 512, *aff'd subnom., Computer and Communications Industry Association v. FCC, supra*, the Commission opened the areas of enhanced services and customer premises equipment to competitive provision. These are just two examples of the policies which the Commission has pursued. However, they do point up the fact that if this policy is to be successful, it will be necessary for the marketplace to operate efficiently. Such efficient operation requires proper price signals generating from supply and demand conditions.

35. Capital recovery is an important determinant of the price at which services can be offered and significantly affects the amount of facilities provided to supply the needs of the communications industry. In *Amendment to Part 31*, 83 FCC 2d 267 (1980), *recon.*, 87 FCC 2d 916 (1981), the Commission adopted remaining life and straight line equal life group depreciation methods that recover capital

on a basis that approximates straight line unit depreciation more closely than did the previously used methods. More timely capital recovery was anticipated to result in faster technological innovation with its accompanying benefits of more efficient service provision and lower costs resulting from more productive use of facilities.

36. Capital recovery issues are important in the implementation of *Computer Inquiry II* due to the part depreciation plays in the determination of net book value and the resultant gain or loss that may occur on the transfer of assets to the new subsidiary. It will also be significant in any later transfer of assets from the provision of regulated service to unregulated service or vice-versa. Thus, appropriate capital recovery will ease the regulatory burdens associated with supervising the transition to the new structure.

37. Depreciation is a significant portion of the revenue requirement of the regulated telephone companies. As such, it plays an important role in determining the price at which they offer their services. If competition is to be viable, it is necessary for prices to reflect depreciation expenses that are realistic for a competitive market. Absent such depreciation levels, improper signals will be given to the market. Since most plant is used interchangeably to provide interstate and intrastate communications service, supply and demand is determined by the combination of inputs from service demand in both regulatory jurisdictions. Approximately 75 percent of exchange plant is allocated to the intrastate jurisdiction. It is clear that unless telephone plant, including that portion subject to allocation to the intrastate jurisdiction, is depreciated at a reasonable rate, improperly time capital recovery will occur. Indeed, in a increasingly competitive environment, it is possible that

improper capital recovery could delay or prevent modernization which would add to the costs borne by ratepayers and could, ultimately, threaten carriers' ability to fully recover their invested capital. Moreover, the extent of state action attempting to prevent carriers from utilizing our depreciation prescriptions places substantial burdens on carriers and could well impair their ability to raise the investment capital they will need to fully compete in the continually evolving competitive telecommunications marketplace.[14] Such a result could undermine the achievement of the Commission's objective to develop policies that will engender a dynamic, efficient telecommunications marketplace with services being provided at reasonable prices.

38. NARUC contends that preemption with respect to station connections is unnecessary and will not produce competitive benefits because expensing is not the same as unbundling. While NARUC is correct in a strict sense, it avoids the critical issue, which is the proper timing of cost recovery. If the Commission preempts with respect to station connections and all states must expense these costs, current ratepayers will be paying these costs instead of future ratepayers as would be the case with capitalization. Thus, future prices will reflect the appropriate costs for providing those services. Moreover, if these costs are

[14] AT&T and GTE indicate several state commission have refused to follow, have indicated an intent not to follow, or are being urged not to follow Commission determinations with respect to the expensing of inside wiring and/or the adoption of straight-line equal life group or remaining life depreciation methods. A staff review of state action in conjunction with AT&T intrastate tariff proceedings reveals that all but two states have approved expensing of station connections, that 13 states have rejected and 12 have approved equal life group depreciation, and that 9 states have rejected and 22 have approved remaining life group depreciation. Prior to issuing our *Order* in this docket we did not expect that such significant variance would be required by states.

expensed and state commissions must allow rates to cover these costs, it is likely that the cost causative ratepayer will in many cases be charged for the costs being expensed in connection with the provision of inside wiring. Thus, the Commission's objective may be substantially achieved by preempting state commissions from departing from our expensing rules.

39. In 1971 Congress amended the Communications Act to change the procedures for allocating costs between federal and state jurisdictions by adding Section 410(c). The Commission was given the ultimate authority with respect to such allocations, further solidifying its superintendency over common carrier communications. See *NCUC I, supra* at 795. Section 410(c) procedures provide for uniformity in the separations process, thereby insuring that plant, expenses and revenues will be rationally accounted for in the dual jurisdictional environment. The utilization of one depreciation rate is the most effective method for insuring that this uniformity will be maintained and to insure that no jurisdiction bears a greater burden than another in the transition to a fully competitive marketplace. Several parties suggest that under or over recovery will result from one jurisdiction or another because of the shifting usage patterns for telephone plant over time and argue that if such a result were to occur, significant inequities would result to both ratepayers and carriers. A uniform depreciation rate for each class of property applicable to all property whether allocated to the federal or state jurisdiction clearly eliminates these potential problems.

40. For all of these reasons, it is apparent to us that a substantial impact on federal policies could result if state commissions were allowed to diverge from Commission

prescribed depreciation rates and practices. Accordingly, it is essential to preempt inconsistent state depreciation practices to avoid frustration of these vital national policies.

III. Declaratory Ruling Petition.

41. GTE of Ohio seeks to have the Commission preempt an order of the Ohio Public Utilities Commission that did not approve remaining life and equal life group rates for intrastate ratemaking purposes. As alleged by GTE of Ohio, the differential in rates amounts to seven million dollars per year. GTE of Ohio states that failure of this Commission to preempt the state will frustrate the achievement of federal policies adopted by this Commission. Its argument is similar to those cited in connection with the reconsideration petition.

42. Essentially the same arguments are made against the GTE of Ohio petition as were urged on reconsideration with regard to the substance of the issue. However, Ohio cites an Ohio statute that precludes the state commission from adopting remaining life depreciation for intrastate purposes.

43. One procedural argument is raised by Ohio with respect to the petition. It contends that the question presented is premature since the order is subject to further reconsideration before the Ohio Commission pursuant to a request filed by GTE of Ohio. We do not agree since the purpose of declaratory rulings is to give guidance to affected persons in areas where uncertainty or confusion exists. A case or controversy in the judicial sense is not required, *NCUC I, supra* at 790-1. In this case, it appears necessary to issue such a ruling to clarify for the state

commissions and the carriers the effect of our depreciation prescriptions. The fact that reconsideration proceedings are under way in Ohio does not mitigate against such a course in light of the divergencies from this Commission's depreciation methods and rates that are occurring to the detriment of federal policies. Thus, we find it imperative to declare today that inconsistent state prescribed depreciation rates are preempted by the Communications Act and are accordingly void. The existence of a state statute preventing a state commission from adopting a particular method does not affect this determination. When federal preemption is involved, there is no difference between a statute or a regulation of a state commission. Both must fall in the face of overriding federal concerns and policies.

IV. Conclusion

44. We have carefully reviewed the record upon reconsideration. The issues raised concerning the *Preemption Order* caused us to reevaluate the statutory language of Section 220(b), the legislative history of the provision, and the relevant judicial and administrative proceedings relating to the subject. Our considered judgment after this review is that the *Preemption Order* must be reconsidered. We find that the most logical and reasonable interpretation of Section 220(b) of the Act is that where the Commission prescribes depreciation rates for classes of property, state commissions are precluded from departing from those rates. Since the depreciation method utilized is a material part in determining the rate to be applied, state commissions are also precluded from departing from the depreciation methods prescribed by the Commission. Thus, the *Expensing Order* is binding upon state commissions and they must expense additions to inside wiring in accordance with the plan established therein. Moreover, they must follow

the amortization procedures adopted in that decision for the embedded inside wiring and any additions to the capitalized amount as a result of the phase-in of the expensing of inside wiring.

45. Even if Section 220(b) does not preempt state commissions, we would act under our authority to preempt state actions that interfere with the accomplishment of federal policies and objectives. *Computer and Communications Industry Associaton v. FCC, supra,* and *NCUC II.* We note that petitioner and the parties supporting the petition cite several states that have indicated they do not intend to follow the Commission's depreciation prescriptions or expensing of inside wiring, or have refused to follow either. In light of the concerns expressed about an efficiently functioning market, we must find that inconsistent depreciation rates prescribed by state commissions will interfere with the efficient operation of the communications marketplace and thereby frustrate the achievement of the Commission's policies. Accordingly, we find that this Commission's depreciation policies and rates, including the expensing of inside wiring, preempt inconsistent state depreciation policies and rates.

46. Accordingly, IT IS ORDERED, pursuant to Section 1, 4(i), and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), and 220(b), That the Petition for Reconsideration filed by the American Telephone and Telegraph Company IS GRANTED.

47. IT IS FURTHER ORDERED, That the Petition for Declaratory Ruling filed by General Telephone Company of Ohio IS GRANTED to the extent reflected herein.

48. IT IS FURTHER ORDERED, That the

Secretary shall cause this order to be published in the Federal Register.

49. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this order to be served on each state commission.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Appendix A. Summary of Comments

1. AT&T argues that the Commission on reconsideration should find that state commissions are precluded from departing from the depreciation methods and rates established by this Commission in order to allow the carriers to achieve timely capital recovery. It views the *Preemption Order* as a retreat from the Commission's competitive policies.

2. AT&T asserts that realistic depreciation rates are essential to attain accurate cost-based pricing decisions to prevent artificial barriers to competition, to foster technological innovation which will enhance network efficiency and the availability of competitive alternatives, to facilitate the timely implementation of the detariffing of customer premises equipment[1] and to insure the financial viability of the carriers. It contends that competitive conditions result in faster obsolescence and shorter asset lives, requiring that depreciation methods and rates be inseparable from ratemaking to insure capital recovery.

[1] It contends that different depreciation rates between jurisdictions will result in disagreements about net book value in deregulating CPE and that the application of the Separations Manual will create uncertainty as to which plant a particular book value relates.

3. AT&T proposes two legal theories for preempting state commission action. First, it asserts that the Commission may preempt under Sections 1 and 2 of the Act, citing *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978), *NCUC II*, *NCUC I*, and *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976). It states that because of the central role depreciation, including the depreciation aspects of station connections, plays in the achievement of the Commission's policies, preemption is necessary to avoid interference with or frustration of these policies.

4. AT&T's second theory is that Section 220(b) preempts states on its face, asserting that in its earlier pleadings it did not rely on Section 220(g) as suggested by the Commission's decision. It argues that Section 220 gives the Commission discretion with respect to accounting rules, but does not give it such discretion with regard to depreciation prescriptions. AT&T states that the Commission's rule allowing carriers to subdivide an account to comply with a state commission order does not mean that a state can require capitalization when this Commission requires expensing. Finally, it submits that the Commission misread the legislative history of the Communications Act by failing to consider statements in the committee reports and remarks of members at committee hearings that indicate Congress believed the Interstate Commerce Act provisions from which Section 220(b) was taken did in fact preempt the states. See also *Depreciation Charges of Telephone Companies*, 118 I.C.C. 295 (1926).

5. GTE asserts that the Commission's policies in the areas of competition and faster capital recovery will be frustrated if the state commissions are allowed to depart from the depreciation rates and methods prescribed by the

Commission. It contends that Section 220(b) preempts the states and distinguishes Section 220(a) as being discretionary on the Commission and argues that the Commission focused only on the provisions of Section 220(a) in its earlier decision. It submits that there is no doubt that a state can require a carrier to keep additional records and memoranda. However, GTE argues that the Commission's decision is overly broad. It is clear, GTE contends, that the Commission can preempt inconsistent state action when it conflicts with national telecommunications policies, and it should do so in this case. GTE also argues that the legislative history and the rules of statutory construction indicate that Congress intended to preempt the states in the area of depreciation, submitting that property cannot be successfully depreciated at two different rates prescribed by different regulatory bodies because under or over recovery from one or the other jurisdiction will occur from the use of shifting usage factors.

6. The oppositions generally argue that the states have the jurisdiction to determine the extent to which intrastate rates reflect depreciation and expensing adjustments promulgated by the Commission. Sections 2(b) and 221(b) are cited as reserving jurisdiction over local and intrastate telephone rates to the states as intended by Congress when it distinguished between "interstate" and "intrastate" in Sections 1 and 2. Ohio argues that the preemption argument was rejected in the only case of which it is aware, *Pacific Telephone and Telegraph Company v. California*, 401 P. 2d 353 (1965).

7. Ohio asserts that the courts have distinguished between ratemaking and interconnection policies, *NCUC II* and *NCUC I*, and submits that it is the ratemaking jurisdiction reserved to the states that is in question in this

proceeding. To permit the Commission to prescribe depreciation rates applicable to all property whether used for interstate or intrastate services would, in Ohio's view, be equivalent to giving the FCC a hand in setting state rates.

8. Ohio is concerned that under some methods, such as remaining life, costs will not be charged to consumers who receive the benefits of the property being depreciated. Finally, it contends that Sections 220(i) and (j) are consistent with concurrent jurisdiction.

9. Ohio argues that GTE is attempting to have the Commission read Section 2(b) out of the Act, and asserts that it is inappropriate to ignore language in a statute, to extend a statute beyond its clear import, or to embrace subjects not specifically enumerated. Section 2(b)(1) is stated by Ohio to have been intended to reverse the Supreme Court decision in *Houston East and West Texas Ry. v. U.S.*, 234 U.S. 342 (1914), wherein the ICC was given the power to suspend intrastate rates enabling carriers to raise intrastate rates to federal levels for similar distances. NARUC and Ohio argue that section 2(b) was intended to ensure that state jurisdiction was not limited by the 1934 legislation.

10. Several parties assert that there is considerable Commission precedent recognizing the states' independent ratemaking authority, including departures from Commission prescribed accounting, for intrastate rates. They note that the Commission has encouraged state commissions to devote more resources to depreciation matters. *Amendment of Part 31*, 83 FCC 2d 267 (1980) *recon.*, 87 FCC 2d 916 (1981), has recognized in this proceeding the state jurisdiction over expensing of station connections for state

ratemaking purposes, has recognized divergent treatment of interest during construction and has not contested California's use of remaining life for approximately thirty years. Ohio argues that there is nothing to suggest that there needs to be national uniformity in depreciation procedures and that local diversity is desirable, noting that even a GTE of Ohio witness in an Ohio rate case has indicated that local diversity in setting depreciation rates is preferable.

11. Ohio contends that *McDonnell Douglas Corp. v. General Telephone Company of California*, 594 F.2d 720 (9th Cir. 1979), recognized the validity of intrastate regulatory jurisdiction under the Act by finding that Congress in enacting Section 2(b) had intended to give states considerable power with respect to wire communications that are wholly intrastate in nature.

12. California argues that the Commission's refusal to preempt state power to prescribe depreciation rates for intrastate ratemaking purposes will not undermine the Commission's procompetitive policies or signal a retreat since many states have adopted policies that foster competition. AT&T's assertion that preemption must be exercised to promote procompetitive policies is rejected by NARUC as unsupported. It states that expensing of station connection costs can have no competitive effect because expensing is not the same as unbundling. Moreover, it contends that the Commission did not adopt remaining life and equal life group depreciation procedures to promote competition but, rather, to more properly time capital recovery and insure that any deficiency in past depreciation was adjusted. Finally, NARUC states that the speculative statements about the numbers of states that are not following the Commission's policies are

inadequate to justify preempting state commission jurisdiction on the theory that federal policies are being frustrated.

13. NARUC argues that the attempted distinction of Section 220(a) from Section 220(b) on the basis that Section 220(b) is mandatory while Section 220(a) is discretionary does not address the question of the preemptive effect of either section. It contends that neither reason nor case law provides support for asserting that preemption of state regulation of intrastate communications is automatic with respect to subject areas which the FCC must regulate on the interstate level. It further notes that the language of Section 220(g) with respect to the effect of prescribed depreciation rates, accounts or records other than as prescribed by the Commission. NARUC states that the relationship between accounting and ratemaking is self evident and argues that state control over intrastate rates would have little vitality if state commissions were deprived of the power to disallow expenses and depreciation claimed by carriers. NARUC asserts that the fact that a proposed Section 220(j) that would have expressly reserved depreciation prescription powers to the states was not adopted does not mean that states must be bound by Commission depreciation prescriptions, stating that the final provision adopted was a compromise.

14. Consumers' Counsel supports the Commission's *Preemption Order* and generally cites from that *Order* in support of its position. Idaho also agrees with the conclusion of the Order and states that it believes that administrative costs of separate record keeping to meet state requirements will be small. Arkansas filed to indicate that its opinions had not rejected the new depreciation methods outright but had left the decision to individual cases for resolution.

15. AT&T's reply submits that the setting of

depreciation rates does not constitute the exercise of jurisdiction with respect to charges for intrastate services. It argues that Section 2)b) does not deprive this Commission of jurisdiction over jointly used property where its regulation affects the conduct or development of interstate communications. AT&T states that if a state utilized the depreciation rate prescribed by the Commission, it may make adjustments to the test period data to reflect concepts of used and useful property or other pro forma adjustment to reflect conditions during the period during which the tariff will be in effect.

16. AT&T distinguishes *Houston East and West Texas Ry. Co. v. U.S., supra*, by asserting that that case involved actual preemption of service rates. It notes that while Congress may have sought to reverse that decision in the communications field, the issue here is only the jurisdiction to prescribe depreciation rates. Thus, it contends that the case actually suggests that Section 2(b) should be narrowly interpreted. Moreover, while use of federally prescribed depreciation rates may significantly affect intrastate rates, the states remain free to price individual service rates. See *e.g., NCUC I.*

17. USITA submits that federal preemption of jurisdiction over depreciation rate prescriptions for carriers for which the Commission has prescribed depreciation rates would not interfere with state commission ability to set intrastate service rates in accordance with any ratemaking method desired. It contends that the setting of depreciation rates is not a ratemaking function pursuant to Sections 201-205, but is the exercise of a specific power granted to the Commission by Congress. USITA argues that divergent depreciation rates create confusion and raise problems of capital recovery.

18. GTE contends that state action whether in the nature of ratemaking or otherwise which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" will be preempted. *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 50 LW 4916, 4919 (1982). GTE concludes that the states do not have the power through the guise of ratemaking to negate FCC action designed to give effect to federal statutory objectives. GTE does not challenge state rights pursuant to state statutes to regulate rates for intrastate services. It asserts that no preclusion of state ratemaking jurisdiction would result from FCC preemption under Section 220(b), although failure to preempt will endanger important national policies.

19. GTE submits that Section 220(b) charges the Commission with the responsibility of prescribing depreciation rates for carriers subject to the Act and recognizes only two exceptions. First, the Commission should act as soon as possible. Second, Section 220(h) recognizes that certain classes of carriers may be exempted. The Commission, according to GTE, has not exercised its authority pursuant to this provision in this proceeding. Finally, GTE argues that reliance on *NCUC I* and *NCUC II* as supporting a finding that the Commission cannot preempt state commission depreciation prescriptions for carriers subject to the Act is inconsistent with the holdings and analysis of those cases. AT&T and GTE submit that Section 221(b) is inapplicable because that provision was intended only to give states the jurisdiction to regulate local exchange service extending over a state boundary.

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

IN RE: RECONSIDERATION OF DOCKET NO. CC 79-105.

Having dissented from the Commission's original decision declining to preempt State accounting and depreciation rules inconsistent with those prescribed by the FCC,[1] I am pleased that the Commission has reconsidered this issue and acted to preempt such inconsistent State regulation.

As this *Order* establishes in detail, a true reading of the statutory language and legislative history of Section 220(b) of the Communications Act clearly demonstrates that Congress intended FCC depreciation rules and policies to control the field.

Even if preemption were not explicity mandated by Section 220(b), the effective implementation of our procompetitive federal telecommunications policies dictates that inconsistent State depreciation regulation be preempted by this Commission. We cannot "defer to the States" on capital recovery issues. Telephone companies must be able to recover their cost of capital in a timely and effective manner if they are to price their services efficiently and to improve and expand their facilities to meet the challenges of competition and technologic innovation.

This preemption imperative is not merely theoretical. Too many States (e.g., Alabama, Louisiana, Nebraska, Ohio, New Jersey, Michigan, Arkansas) have already refused to

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[1] Amendment of Part 31, Joint Dissenting Statement of Commissioners Joseph R. Fogarty and Anne P. Jones, 89 FCC 2d 1109-1111 (1981).

recognize the critical necessity of the FCC's cost recovery principles. The resulting depreciation rate differentials are alarming: GTE of Ohio has indicated that it will be denied $7 million in capital recovery this year if the State of Ohio's disparate depreciation treatment is allowed to prevail.

The FCC cannot ignore the detrimental impacts of inconsistent State treatment of depreciation if our pro-competitive policies are to have any integrity and viability. This Commission now recognizes that preemption is both mandated as a matter of law and essential as a matter of policy, and our action today has my full endorsement and support.

APPENDIX "B"
JUDGMENT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 83-557-A

SOUTH CENTRAL BELL TELEPHONE COMPANY

VERSUS

LOUISIANA PUBLIC SERVICE COMMISSION,
ET AL

ORDER FOR PRELIMINARY INJUNCTION

This cause came on for hearing of Plaintiff's Motion for Preliminary Injunction. The Court having considered the evidence herein, heard the oral arguments of counsel and reviewed the briefs filed, finds and orders as follows:

1) The Court has jurisdiction to issue the injunction sought under 47 U.S.C. §401(b).

2) The Johnson Act, 28 U.S.C. §1342, is not a bar to this action.

3) The Plaintiff is entitled to a preliminary injunction and a preliminary injunction should issue.

4) Unless an injunction is issued, the Plaintiff will suffer irreparable harm inasmuch as neither Defendants nor this Court can authorize Plaintiff to recover retroactively any revenues lost during the pendency of the underlying cause of action on the merits.

5) No harm will accrue to the other parties to this proceeding or to the Plaintiff's ratepayers inasmuch as neither Defendants nor this Court can authorize Plaintiff to recover retroactively any revenues lost during the pendency of the underlying cause of action on the merits.

5) No harm will accrue to the other parties to this proceeding or to the Plaintiff's ratepayers inasmuch as Plaintiff will place the rates at issue in effect subject to refund with interest and will refund any amounts so collected should the January 6, 1983, FCC Order in Docket 79-105 not be upheld on appeal. Collection of rates subject to refund with interest is adequate security under FRCP Rule 65(c).

6) The Court finds that it is in the public interest of insuring compliance with the Congressional mandate of developing nationwide uniformity in telecommunications policy to enforce a binding FCC order regarding depreciation rates and methodologies while it is in effect.

7) Plaintiff has demonstrated a likelihood of prevailing on the merits of this case.

8) WHEREFORE, for the reasons stated, it is hereby ordered:

That a preliminary injunction issue against Defendants requiring them to abide by the FCC's January 6, 1983, Order regarding depreciation rates and methodologies until this action is finally resolved and, within ten (10) days of the date of this order, issue an order which provides for the collection of rates by Plaintiff sufficient to recover the intrastate revenue requirement resulting from the FCC-prescribed depreciation rates and methodologies.

These rates will be subject to reasonable refund provisions as the Defendant may authorize should Plaintiff not prevail on the merits of this case and which will include provisions to make refunds to those customers who terminate service of the Plaintiff during the effective dates of the injunction.

Baton Rouge, Louisiana, June 27, 1983.

/s/ JOHN V. PARKER

JOHN V. PARKER, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX "C"
NOTICE OF APPEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-3494

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Plaintiff-Appellee,

versus

LOUISIANA PUBLIC SERVICE COMMISSION, THOMAS E. POWELL, GEORGE J. ACKEL, ED KENNON, LOUIS LAMBERT and JOHN G. SCHWEGMANN, JR.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Louisiana

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Louisiana Public Service Commission, appellee, appeals to the Supreme Court of the United States from the decision of the United States Court of Appeals for the Fifth Circuit dated October 11, 1984, affirming the decisions of the United States District Court for the Middle District of Louisiana dated June 27, 1983 and August 1, 1983.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

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APPENDIX "D"
STATE RATEMAKING ORDERS

LOUISIANA PUBLIC SERVICE COMMISSION

ORDER NO. U-15445

DOCKET NO. U-15445

SOUTH CENTRAL BELL TELEPHONE COMPANY
(NEW ORLEANS, LOUISIANA).

ex parte

In re: Proposed revision of its intrastate rates and charges for telephone service within the State of Louisiana.

This case involves the application of South Central Bell Telephone Company ("South Central Bell" or "the Company") requesting an increase in its intrastate rates and charges for the service it renders in the amount of $238,600,000.00. The Company also requested an increase in certain of its tariffs applicable to the provision of private line services. Interventions were filed by Common Cause of Louisiana, the Louisiana Telephone Answering Service Committee, the Louisiana Alarm Association, the Division of Administration of the State of Louisiana and the United States Department of Defense. The Company, intervenors and the Commission pre-filed testimony and exchanged data requests and responses. Hearings were conducted on December 13, 14, and 15, 1982, and January 17, 18, and 19, 1983.

South Central Bell is a Delaware corporation doing business as a public utility in the State of Louisiana. The last rate increase received by the Company in Louisiana was on January 21, 1981 when an increase in intrastate rates of $51,408,000.00 was approved by this Commission. *Ex Parte South Central Bell Telephone Co.*, Order No. U-14673 (La. Pub. Serv. Comm. 1981).

During the period since the last rate case when rates were adjusted to produce an additional $51,408,000.00 annually for this Bell operating company, the state of the economy has resulted in unprecedented unemployment exceeding 12% in this State alone and many industrial corporations and businesses have experienced and are experiencing operating losses in the millions of dollars. While at the same time, the rate of inflation has substantially abated and interest rates have declined appreciably.

In the light of the foregoing especially since the Company has earned a rate of return comparable to that found to be reasonable by the Commission in the last rate proceeding, we find no justification for an increase in rates at this time.

Accordingly,

IT IS HEREBY ORDERED that South Central Bell's request for an increase in its intrastate rates in the amount of $238,600,000.00 is denied.

BY ORDER OF THE COMMISSION:
BATON ROUGE, LOUISIANA
MAY 19, 1983

/S/ THOMAS E. POWELL
CHAIRMAN

/S/ ED KENNON
COMMISSIONER

/S/ LOUIS J. LAMBERT, JR.
COMMISSIONER

*Commissioner John Schwegmann concurs in part and dissents in part.

/S/ JOHN F. SCHWEGMANN
COMMISSIONER

/S/ GEORGE J. ACKEL
VICE CHAIRMAN

/S/ LOUIS S. QUINN
SECRETARY

* (Separate Opinion Attached)
[Opinion of Commissioner Schwegmann omitted]

LOUISIANA PUBLIC SERVICE COMMISSION

ORDER NO. U-15445-A

DOCKET NO. U-15445

SOUTH CENTRAL BELL TELEPHONE COMPANY
(NEW ORLEANS, LOUISIANA),

ex parte

In re: Proposed revision of its intrastate rates and charges for telephone service within the State of Louisiana.

This case is before the Commission pursuant to an order of the United States District Court for the Middle District of Louisiana, Honorable John V. Parker, which was issued on June 27, 1983.

In May, 1982, South Central Bell Telephone Company ("South Central Bell" or "the Company") requested an increase in its intrastate rates and charges in the amount of $238.6 million. Included within that rate request was a request for more than $40 million in revenues that the Company alleged it would need if the Commission adopted certain methodologies for computing the expenses of the Company prescribed by the Federal Communications Commission ("FCC").

Specifically, South Central Bell asked the Commission to employ, for the purpose of intrastate ratemaking, Equal Life Groups and Remaining Life depreciation

methods rather than the Straight Line Vintage Life Group method which had previously been employed by the Commission and consistently approved by the courts of this State. In addition, South Central Bell sought to have the Commission "expense" 75 per cent of the costs associated with station connections, rather than capitalizing these costs as the Commission had done in the past. At the hearings of the rate case, South Central Bell alleged that the FCC had *mandated* the use of the new methods in an Order issued January 6, 1983 Memorandum Opinion and Order, CC Docket No. 79-105 (FCC, Jan. 6, 1983). The net effect of the adoption of these proposals would have been to increase the Company's intrastate expense level by $40,506,000.

After extensive hearings on the rate request, this Commission issued Order No. U-15445 (Commissioner Schwegmann concurring in part and dissenting in part). In light of unprecedented unemployment levels, the state of the economy, the fact that inflation has substantially abated, the decline in interest rates and the fact that the Company had earned a rate of return comparable to that found reasonable in the last rate proceeding, among other factors, this Commission denied the Company's rate request. However, the Commission did not make a finding at that time of the fair rate of return on equity for South Central Bell, since no increase in revenues was required.

On May 19, 1983, South Central Bell filed suit in the Federal court seeking the issuance of a preliminary injunction ordering the Commission to recognize the FCC-mandated depreciation rates. On June 27, 1983, the Honorable John V. Parker ordered that within 10 days the Louisiana Public Service Commission "issue an order which provides for the collection of rates by (South Central

Bell) sufficient to recover the intrastate revenue requirement resulting from the FCC-prescribed depreciation rates and methodologies". It is this ruling by a federal judge ordering the Louisiana Commission to increase *intrastate* rates which forces the Commission to issue this Order.

This Commission is the body constitutionally vested with the duty and authority to regulate all common carriers and public utilities providing intrastate service in Louisiana. We believe that this most recent attempt by the FCC to preempt this State's authority to regulate intrastate rates and services is inconsistent with the Communications Act and may run afoul of the limitations contained in the United States Constitution protecting state sovereignty. However, we are faced with an order of a federal judge which has not yet been overturned. Although we believe that the order is invalid, we are compelled to obey it at this time. For that reason we will reconsider the case in light of the increased expense level of $40,506,000 resulting from the FCC Order. (Although the Company asked the federal court to increase revenues in the amount of $41,463,000, that request was based on 1983 data, none which was ever presented to the Commission. The appropriate figure based on test year data reviewed by the Commission is $40,506,000).

As noted, the Commission denied the rate request of South Central Bell in May, but did not make a determination of the fair rate of return on equity. The currently authorized overall rate of return of South Central Bell was set in 1981, when market interest rates were significantly higher than they are today. The prime rate has remained at about 10½ per cent for some time. In addition, the rate of return earned by the Company includes a return on unamortized investment tax credits, which constitute

approximately 7.5 per cent of South Central bell's total capital. In fact, however, these tax credits are cost-free investment of the Company, so in reality the rate of return on its investor-supplied equity is higher than that authorized for regulatory purposes. When these factors are viewed in light of the continued low level of inflation, and continued high unemployment, we find that a rate of return on equity of 12 per cent is sufficient to assure confidence in the Company's financial soundness, will be adequate to maintain and support its credit and will permit it to raise the capital necessary to perform its public functions. The gross revenue increase necessary to produce a rate of return on equity of 12 per cent after taking account of the ratemaking adjustments proposed by a consultant of the Commission, Bruce M. Louiselle, and recognizing the full amount of the FCC-mandated accounting changes as quantified by South Central Bell, is $12,700,000.

The increase in rates approved in this Order shall be distributed as follows:

ITEM	AMOUNT
Basic Local Flat Rate Exchange and Related Services; Including Residence and Business basic local service, Centrex Access Measured PBX, etc.	$ 1,000,000
Service Charges	1,000,000
Miscellaneous Services: 2,000,000 Including Toll Terminals, Grouping Service, Zone Charges, etc.	
Network Services	2,000,000
Customer Premises Products	6,000,000
Unrecovered Telephone Equipment Charge	700,000

Total Billing Charge	$12,700,000
Less Independent Company Settlements	(257,000)
	$12,443,000

Accordingly,

IT IS HEREBY ORDERED THAT:

(1) South Central Bell Telephone Company be permitted to increase its tariffs in the amounts directed by the Commission sufficient to increase its gross annual revenues by $12,700,000;

(2) This increase shall be implemented subject to refund with interest at 12 per cent per annum and the Commission reserves the right to require further security from the Company;

(3) No increases shall become effective until such time as the Company files and the Commission accepts tariffs drawn in accordance with this order and which provide for a refund plan which includes provisions for refunds to ratepayers who discontinue or change service during the time that these increased rates are in effect.

BY ORDER OF THE COMMISSION:
BATON ROUGE, LOUISIANA
JULY 7, 1983

/s/ THOMAS E. POWELL
CHAIRMAN

COMMISSIONER

/s/ LOUIS J. LAMBERT, JR.
COMMISSIONER

*Commissioner John Schwegmann concurs in part and dissents in part.

COMMISSIONER

/s/ GEORGE J. ACKEL
VICE CHAIRMAN

/s/ LOUIS S. QUINN
SECRETARY

* (Separate Opinion Attached)

Commissioner Schwegmann, concurring in part and dissenting in part,

At the time of the decision of the South Central Bell rate case, I stated the position that a maximum rate increase of $21,989,000 should be granted the Company in view of the burdensome effect of any increase on consumers. This increase would have produced a 14 per cent rate of return on equity.

I agree that the federal court order should be complied with in full, recognizing that full $40.5 million in accounting changes sought by the Company. After giving effect to this increase in expenses, I would still raise the revenues of the Company by the gross amount (after independent company settlements) of $21,989,000. This increase would produce a rate of return on equity of 12.6 per cent. I recognize that this rate of return is below the amount I deemed reasonable in May, but I believe we still must balance the investor interests against the interests of consumers, and in light of all relevant factors, this rate of return is still reasonable.

/s/ JOHN F. SCHWEGMANN
JOHN F. SCHWEGMANN, Commissioner

LOUISIANA PUBLIC SERVICE COMMISSION

GENERAL ORDER

In re: Reaffirmation of the applicability of state regulatory principles to telephone terminal equipment and telephone accounting practices.

This General Order is issued to set forth the scope of regulatory authority over telephone tariffs that is exercised, and will continue to be exercised absent a contrary and authoritative judicial order, by the Louisiana Public Service Commission. In the view of the Commission, this statement of regulatory policy is necessary because of orders issued by the Federal Communications Commission ("FCC") which attempt to preempt the authority of this Commission and other state regulatory agencies to regulate certain intrastate activities of communications common carriers.

In a proceeding generally known as the "Second Computer Inquiry," the FCC last year stated its intention to preempt the authority of state regulatory agencies to establish tariffs for the marketing of "terminal equipment" by communications common carriers. "Final Decision," In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) (hereinafter referred to as "Second Computer Inquiry"), Docket No. 20828, 77 F.C.C. 2d 384 (Released May 2, 1980); "Memorandum Opinion and Order" in Second Computer Inquiry, 84 F.C.C. 2d 50 (Released Dec. 30, 1980). "Terminal equipment" is that equipment located on

a customer's premises which the customer uses to transmit and recieve communications through the telecommunications network. Thus, it includes equipment ranging from the ordinary telephone to the sophisticated equipment used on the premises of businesses. The action of the FCC is designed to further an asserted federal policy of "deregulation" and would permit the Bell System, along with other common carriers, to set the prices for terminal equipment free of rate regulation by any state regulatory agency or the FCC. In the words of the FCC, the Second Computer decision has the effect of "eviscerating state jurisdiction to establish charges for this terminal equipment in a manner that conflicts with federal interests...." Memorandum Opinion and Order in Second Computer Inquiry, 84 F.C.C. 2d 50, 103 (Released Dec. 30, 1980).

The Louisiana Commission did not learn of the scope and potential impact of the decision in the Second Computer Inquiry until recently. Although the ruling attempts a vast reordering of federal and state regulatory prerogatives, no public notice issued by the FCC prior to its Final Decision even mentioned the possibility that any preemption of state authority might be attempted. The Second Computer Inquiry was orignially undertaken to redefine the distinctions between communications and data processing services previously adopted by the FCC. Notice of Inquiry and Proposed Rulemaking in Second Computer Inquiry, 61 F.C.C. 2d 103 (Released Aug. 9, 1976); Supplemental Notice of Inquiry and Enlargement of Proposed Rulemaking in Second Computer Inquiry, 64 F.C.C. 2d 771 (Released March 8, 1977); Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 F.C.C. 2d 358, 440-43 (Released July 2, 1979).

The potential consequences of the regulatory policies

of the FCC began to become apparent, however, when South Central Bell Telephone Co. requested drastic increases in intrastate rates to satisfy prospective changes in depreciation rates and other accounting practices prescribed by the FCC. See *Ex parte South Central Bell Telephone Co.*, Order No. U-14673 (La. Pub. Serv. Comm'n., Jan. 21, 1981) at 30 *et seq.* These accounting changes are associated with the process of deregulation and are designed in part to allow the telephone company an accelerated return of capital to permit the transfer of assets to an unregulated Bell System subsidiary at low prices. Final Decision in Second Computer Inquiry, 77 F.C.C. 2d 384, 449 (Released May 2, 1980). Faced with the claim for substantial intrastate rate increases to promote federal objectives, this Commission initiated an inquiry into the scope and impact of the Second Computer decision and related actions of the FCC. *Ex parte South Central Bell Telephone Co.*, Order No. U-14673 (La. Pub. Serv. Comm'n., Jan. 21, 1981) at 30 *et seq.*

The Second Computer decision, if it is implemented, will have a number of consequences for state regulatory agencies and intrastate ratepayers. First, the state agencies will be precluded from regulating the Bell System and other common carriers in the marketing of terminal equipment. Consumers will be forced to pay whatever prices can be exacted by these carriers in light of local market conditions. Second, state regulatory agencies will be unable to foster the goal of universal service by permitting the rates for terminal equipment, which ordinarily reflect at least the full intrastate and interstate cost of this equipment, to defray part of the expenses associated with basic service. Thus, intrastate rates will increase. Third, the other actions of the FCC taken to implement the deregulation decision, such as the prescription of accelerated depreciation rates, will cause intrastate rates to increase even further.

The attempted preemption of state ratemaking authority by the FCC is ironic because the FCC has never established the tariffs for most enhanced services, nor do federal tariffs exist for most of the terminal equipment provided to consumers by common carriers. The establishment of these rates has historically been the prerogative of state regulatory agencies.

Much of the plant devoted to communications service in this country is devoted to both intrastate and interstate use. Thus, a piece of terminal equipment may be used primarily for intrastate calls in the local exchange and intrastate toll calls, but it may also be used for interstate toll calls. A similar joint use is made of the inside wiring on the customer's premise, the wiring that connects customers to switching facilities, some of the central office equipment, and other plant. Under the decision of the United States Supreme Court in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 51 S.Ct. 65 (1930), a fair apportionment is required of the costs attributable to each jurisdiction in order to fairly account for these costs. Over time, a separations process has developed to accomplish this objective. Of the joint costs, which are apportioned in part according to the use of the facilities, the majority are assigned to the intrastate jurisdictions.

While the costs associated with terminal equipment are divided between the state and federal jurisdictions, the responsibility for tariffing jointly used terminal equipment has always rested with the state regulatory agencies. Thus, the FCC recognized that the only federal tariffs for terminal equipment involve equipment used exclusively in "interstate or foreign communications" and that all terminal equipment subject to the separations process is "tariffed at the state level." Memorandum Opinion and

Order in Second Computer Inquiry, 84 F.C.C. 2d 50, 67, 66 (Released Dec. 30, 1981).

The objectives of regulation on the intrastate level vary from state to state. However, one general objective of utility regulation is to ensure that an entity enjoying "natural monopoly" status does not charge excessive prices to consumers. A second objective is to ensure the ready availability to the general public of common carrier services: the concept of universality of service. Regulatory agencies may act to ensure that communications service is provided to all who request it at reasonable prices. These regulatory policies have long been accepted in Louisiana.

The method by which regulatory agencies protect the consumer, while ensuring the financial health of the utility, is through the ratemaking process. As Professor Priest indicates in his treatise, "(e)very state has...established a regulatory agency" and "the early predicates for regulation were developed under the guidance of state tribunals." A.J.G. Priest, Principles of Public Utility Regulation (Michie Co., 1969) at 26. The ratemaking process is designed to set utility prices at a level that will allow only a fair rate of return to the utility. *Id.* at 191 *et seq.* The overriding principle is the "protection of the public interest." *Id.* at 193.

Generally, only communications common carriers have been regulated in the marketing of terminal equipment. The prices charged by independent suppliers of terminal equipment, that do not engage in common carrier actaivities, have not been regulated. The only companies "deregulated" by the FCC are the Bell System and other common carriers. The Bell System, however, enjoys enormous economic power in the United States. South Central

Bell Telephone Co. has natural monopoly status in this state. In only a few areas of the state do market conditions reflect any significant "competition" in the marketing of terminal equipment. In most areas, an unregulated telephone company would be free to charge excessive prices.

A full implementation of the deregulation decision of the FCC, including the changes in accounting practices proposed to further the goal of deregulation, could cause increases in Louisiana intrastate rates of more than $100 million annually. The economic power of the Bell System would be enhanced. Consumers would be unprotected in obtaining terminal equipment from a natural monopoly. The policy of universal service would be retarded.

The Louisiana Constitution and other laws of this State vest this Commission with regulatory authority over the telephone company. This law provides the Commission with broad authority over regulated utilities. Concomitantly, the Commission has a duty to exercise its authority in reasonable fashion to protect consumers while ensuring fairness to utilities. The law of the State and our longstanding regulatory policies do not permit the Commission to meekly accede to an ill advised policy of regulatory abdication advocated by a federal agency.

In the view of this Commission, the Communications Act of 1934 specifically reserves to the states the authority to prescribe rates for equipment used primarily for intrastate communications. 47 U.S.C. §§152(b), 221(b). Even if it did not, the attempt of a federal agency to displace our authority to protect Louisiana citizens, while providing no assurance that federal regulations will protect them, runs afoul of constitutional limitations protecting state sovereignty. National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465 (1976).

In order to place the FCC and South Central Bell Telephone Co. on notice of the regulatory policy of this State as it relates to the policies announced by the FCC, this Commission hereby orders:

(1) The marketing of terminal equipment by communications common carriers will continue to be the subject of rate regulation by this Commission, even after March 1, 1982. This order will apply to any attempt of the Bell System to market this equipment through a separate subsidiary.

(2) Depreciation rates for imbedded terminal equipment, and all other equipment historically regulated in the intrastate jurisdiction, will be set according to policies approved in this State. They will not be established to further a policy of "deregulation" of the FCC.

(3) Changes in accounting procedures proposed by common carriers will be examined for their consistency with the approved regulatory practice of this State and will be approved or disapproved on this basis, and thi- basis only.

The staff, special counsel and consultants of the Commission are instructed to take the necessary actions to ensure the implementation of this Order. The Order does not reflect any change in the regulatory policy of this Commission. However, it is necessary in light of the policies announced by the FCC.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
JUNE 30, 1981

/s/ ED KENNON
CHAIRMAN

/s/ THOMAS E. POWELL
VICE CHAIRMAN

/s/ LOUIS J. LAMBERT, JR.
COMMISSIONER

/s/ GEORGE J. ACKEL
COMMISSIONER

/s/ JOHN F. SCHWEGMANN
COMMISSIONER

/s/ LOUIS S. QUINN
SECRETARY

BEFORE THE
LOUISIANA PUBLIC SERVICE COMMISSION

DOCKET NO. U-15955

EX PARTE APPLICATION OF
SOUTH CENTRAL BELL TELEPHONE COMPANY
FOR A REVISION OF ITS INTRASTATE
RATES AND CHARGES

ORDER NO. U-15955-A

I. INTRODUCTION

This case involves the application of South Central Bell Telephone Company ("South Central Bell") for an increase of its intrastate rates and charges of $407,337,000. The case involves unprecendented issues in telecommunications because it requires the Commission to set rates for the period following the divestiture of South Central Bell and other Bell operating companies by the American Telephone and Telegraph Co. ("AT&T") pursuant to the settlement of the antitrust suit brought against AT&T by the Justice Department. The settlement was modified and approved by a United States District Court in *United States v. American Telephone & Telegraph Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub. nom., Maryland v. United States*, __ U.S. __ (1983). In addition, this case follows the decision of the Federal Communications Commission preempting state jurisdiction over certain services and offerings of telecommunications commcn carriers and deregulating these areas. *Computer & Communications Industry Ass'n v. Federal Communications Commission*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub. nom. Louisiana*

Public Service Commission v. Federal Communications Commission, __ U.S. __ (1983).

The company filed its rate application November 4, 1983. It requested general rate relief, but also asked for an interim, emergency rate order to make up revenues assertedly to be lost January 1, 1984 as the result of divestiture and deregulation. On December 30, 1983, the Commission issued Order No. U-15955, granting the company authority to file access tariffs sufficient to produce annual revenues of $141.5 million, with the charges to be assessed entirely to interexchange carriers. This amount was later reduced to about $138 million by agreement of South Central Bell and the principal interexchange carrier, AT&T Communications of the South Central States, Inc. ("ATTCOSCSI"), a subsidiary of AT&T.

South Central Bell formerly was a wholly owned subsidiary of AT&T. It now is a wholly owned subsidiary of Bell South Corporation ("BellSouth"), a corporation that was "spun off" by AT&T at the time of divestiture. Southern Bell Telephone & Telegraph Company is also a wholly owned subsidiary of BellSouth. To accomplish the divestiture, South Central Bell transferred most of its customer premises equipment ("CPE") to a subsidiary of AT&T and transferred other equipment, assets and personnel to other entities.

Interventions were filed in this proceeding by a number of parties, including ATTCOSCSI, the Alarm Association of Louisiana, Southern Pacific Communications, Southern Message Service, Inc., Radiofone, Inc., the American Petroleum Institute's Central Committee on Telecommunications, Louisiana Telephone Association, Lafourche Telephone Company, and the Regulatory Law

Office, U.S. Army Legal Services Agency. A hearing was conducted on the interim application December 8, 1983, and hearings for the cross-examination of witnesses presented by South Central Bell, the Commission Staff, and intervenors were held April 10, 11 and 12, and May 15, 16 and 31, 1984.

II. THE RATE APPLICATION

In a normal rate case, determining the revenue requirements of the utility requires five steps: 1) choosing the test period for the measurement of the earnings of the company; 2) calculating the rate base in the test period; 3) finding the adjusted operating income for the period; 4) determining the fair rate of return; and 5) adjusting rates to allow the utility the opportunity to earn this rate of return. Traditionally, the Commission has used a past test period and adjusted the data for known changes to occur when rates are in effect and, if necessary, for attrition.

In this case, the traditional rate-making mechanism is complicated enormously by divestiture and deregulation. Because of these events, historic data is not necessarily indicative of future conditions. The splitting of the assets, personnel, offerings and services of the company do not necessarily have a proportionate impact on expenses and revenues, so it is impossible to predict the rate levels for the divested company that are necessary to produce the fair rate of return. Moreover, because of divestiture and deregulation, the rate filing is based to an unprecedented degree on assumptions and estimates, many of which were made by employees of AT&T or employees of South Central Bell who are now employed by AT&T. The presumptive validity attaching to the books and records of a utility in a normal case, when this material is kept in accordance

with standard and accepted accounting practices, does not apply to the unique decisions made in connection with the reorganization of the industry, especially since an entity that is now a potential competitor of South Central Bell controlled many divestiture decisions.

In addition, because divestiture was a mammoth task, involving decisions by hundreds of employees of AT&T and South Central Bell, it is impossible to test these decisions for their prudence and regulatory propriety. This Commission simply does not have resources to match those devoted by the telephone company to this effort. Thus, regulatory scrutiny in the normal sense is not possible.

These observations do not mean that rates should not be established for the post-divestiture period, but that any prognostication of the impact of these events is unreliable and the capacity of the Commission to protect the interests of ratepayers is reduced. The rate setting process requires an unusual dose of judgment. The handicaps under which the Commission must set rates mandate caution in analyzing the company's forecast of a need for additional revenue.

A. The Test Year.

South Central Bell proposed the use of a fully forecasted 1984 test year. The Commission traditionally has relied on actual data for a recent past test year, but recognizes that divestiture and deregulation make past data unreliable for predicting the future. Nevertheless, the use of actual data, adjusted to the extent possible, for divestiture, is likely to be more representative, and permit better regulatory scrutiny, than data based entirely on estimates. Therefore, the Commission adopts the test year

1983. South Central Bell was given the opportunity to suggest all necessary adjustments to this data.

B. The Rate Base.

The Commission adopts the rate base proposed by its regulatory consultant, Mr. Kenneth Gallagher. The adjustments proposed by Mr. Gallagher are consistent with the traditional practices of the Commission and reflect reasonable adjustments to the estimates proposed by the telephone company. The Commission notes that the estimates of 1984 separations factors made by South Central Bell increase the rate base by $125 million as compared to the 1983 factors. These estimates were not supported in any detail by the company and could not be checked by the Commission's consultants.

In addition, it should be noted that given the impact of divestiture, it is no longer necessary to separate customer deposits into intrastate/interstate components. The amount to be properly deducted from the intrastate rate base is the entire unseparated amount.

South Central Bell recently spun off its directory assistance operation to a subsidiary of BellSouth. The consultants of the Commission indicated that even though South Central Bell will receive a percentage of directory assistance revenues, these revenues will decrease. Pursuant to their recommendation, South Central Bell is directed to maintain its records in a manner that will permit the Commission to determine in the future the revenues lost because of the spin off. For the test year, only an adjustment to working capital is required to achieve the proper ratemaking treatment of the directory assistance matter.

The adjusted rate base is set forth below:

RATE BASE FOR TEST YEAR 1983

($1,000)

Telephone Plant in Service		2,347,680
Depreciation Reserve		(315,530)
Net Telephone Plant		2,032,150
Long-Term Telephone Plant Under Construction		22,971
Short-Term Telephone Plant Under Construction		24,545
Property Held for Future Use		335
Working Capital		(15,372)
Less: Non-Investor Supplied Capital		
Customer Deposits Including Interest	(13,064)	
Accumulated Deferred Income Taxes	(249,249)	
Pre-1971 Investment Tax Credits	(1,293)	
Reserve for Uncollectibles	(1,355)	
Total Non-Investor Supplied Capital		(264,961)
CPE Phase-Out		(18,457)
Capitalized CPE Transfer		290
Rate Base		1,781,501

C. Adjusted Operating Income.

The net operating income for 1983 was adjusted for divestiture. Mr. Gallagher recommended that a number of further adjustments proposed by South Central Bell be

accepted and that others be rejected. In addition, he proposed several adjustments to this data. The recommendations of Mr. Gallagher all appear reasonable and are adopted by the Commission. Only the following adjustments require discussion.

1. Changed divestiture ratios.

Mr. Gallagher recommended that the ratios for the computation of certain payroll adjustments be changed from those proposed by the company. South Central Bell developed the ratios using a post-divestiture forecast of the number of employees in 1984 and a pre-divestiture forecast for 1984, though the 1983 number of employees was used to price out the adjustments. With respect to the test year labor costs, Mr. Gallagher's adjustment to reflect the effect of the actual number of employees retained upon divestiture is accepted. The revised proforma wage adjustments proposed by Mr. Gallagher are also accepted. Mr. Gallagher's method of comparing the post-divestiture actual number of employees to the 1983 figures used to develop the pre-divestiture adjustment is the correct procedure to develop the appropriate ratios.

2. Reimbursements.

The company received reimbursements from AT&T for expenses previously financed by ratepayers. These funds should be amortized back to ratepayers over a reasonable period, as recommended by Mr. Gallagher.

3. General Services and Licenses—
Central Service Organization.

Mr. Gallagher estimated the amount of General

Services and Licenses expense and the Central Service Organization expense by starting with and adjusting the 1983 License Contract expense. The Commission approves this method, which is a reasonable method of projecting this expense. The Commission adopts Mr. Gallagher's recommendations concerning the divestiture ratios to be applied to various expense categories and the removal of certain categories for ratemaking purposes.

4. Adjustment to Previously Deferred Research Costs.

South Central Bell retained 100 per cent of previously deferred research costs rather than transferring some of these costs, along with assets, to AT&T. Mr. Gallagher recommended that only a percentage of these costs be recognized for ratemaking treatment, since research improved all of the company's technology, including that transferred to AT&T. A portion of the research costs will be amortized to ratepayers as recommended by Mr. Gallagher.

5. Depreciation and Expensing of Station Connections.

In 1983, the Commission rejected the implementation of certain accounting changes approved by the Federal Communication Commission and assertedly made mandatory for state regulatory agencies in a Preemption Order issued by the FCC. South Central Bell obtained a preliminary injunction from a federal court requiring that the additional book expenses be recognized and that a rate increase be granted, subject to refund, to permit the collection of these expenses. The increase was approximately $41 million. The decision is now on appeal to the United States Court of Appeals for the Fifth Circuit.

The expense in the test year for these items for the post-divestiture South Central Bell causes the need for additional revenues of approximately $41 million. The 1984 represcriptions recently approved by the FCC require additional revenues of $21.72 million. In sum, then, the total revenue effect of the mandated changes in depreciation methods and rates is approximately $62.7 million.

Except for the federal court order, the Commission would not approve the new depreciation methods or the expensing of station connections. However, because of the preliminary injunction, the additional expenses will be recognized for ratemaking purposes, pending the decision of the courts on the appeal of the preliminary injunction.

The rates attributable to these expenses will be imposed subject to refund. South Central Bell is directed to keep records sufficient to make the necessary refunds.

6. Amortization of Excess Deferred Income Taxes.

Due to the change in the federal income tax rate, the Company has accumulated "excess" deferred taxes. The deferred taxes were accumulated at a 48 per cent rate, but the tax liability now only reflects a rate of 46 per cent, meaning that funds have been accumulated for which there is no tax liability. The company proposes to return this excess to its ratepayers over the life of the plant which gave rise to the deductions. It asserts that this treatment is in accord with generally accepted accounting principles and also that if the company returned these deferred taxes more rapidly to ratepayers it would jeopardize its ability to defer federal income taxes pursuant to the Internal Revenue Code.

Mr. Gallagher recommended that these excess deferred taxes be amortized to ratepayers over a two year period. These excess deferred taxes have arisen as a result of accounting convention and do not in fact constitute a potential liability of the Company. The money was advanced by ratepayers. The Company has offered no reason to support its retention of these funds for any longer than two years.

Finally, there is no indication that South Central Bell runs a significant risk of losing its ability to defer federal income taxes if these excess deferred taxes are amortized over a two year period. The Commission will still permit the normalization of the tax effects of accelerated depreciation. In addition, various other state regulatory commissions have required that such excess reserves be amortized over a shorter period of time than the life of the associated plant and there have been no adverse effects on the ability of the regulated companies to defer federal taxes.

7. Interest during construction.

Interest during construction should be reflected at the overall cost of capital approved by the Commission, both for long-term and short-term plant under construction. The appropriate adjustment at the rate of return of 11.82% is $651,000.

8. Tax effect of proforma interest.

Mr. Gallagher indicated that the test year tax expense be adjusted to reflect the proforma amount and cost rate of debt adopted for ratemaking purposes. This recommendation is consistent with the standard practice of the Commission and is adopted.

The adjustments to operating income are set forth below:

ADJUSTED OPERATING INCOME

($1,000)

Test Year Net Operating Income		90,717
ADJUSTMENTS		
Annualize 4/83 Management Salary Increase	(400)	
ES, CPE, FSS Reimbursements	1,401	
AMPS Reimbursement	760	
8/83 Tariff Increase	8,205	
Annualize 8/83 Non-Mgmt. Salary Increase	(2,924)	
Annualize 10/83 Management Salary Increase	(1,564)	
Annualize 1983 Pensions Accrual Increase	(396)	
Annualize Independent Company Settlements	238	
Remove Divestiture "Get Ready" Costs	227	
Annualize RL/ELG—1983	(4,460)	
Remove ASD Formation Costs	316	
Remove Regional Service Company Costs	2,659	
Proforma Non-Management Savings Plan	(76)	
Proforma 1984 FICA	(386)	
Proforma 4/84 Management Salary Increase	(529)	
Proforma 8/84 Non.-Mgmt. Salary Increase	(4,172)	
Proforma 10/84 Management Salary Increase	(683)	

Proforma 1984 Property Tax Increase	(1,693)	
Proforma 1984 Revenue—ATTIX/ EBO	376	
Proforma 4/85 Management Salary Increase	(989)	
ESC—100%	(9,676)	
Adjust Test Year Payroll for Divestiture Ratio	8,910	
Amortization of Reimbursements	178	
CPE Phase-Out	3,463	
CPE Transfer to Employees	234	
Official Toll	(2,284)	
Contract Charging	(4,016)	
Adjust IDC to 11.82	651	
Interest on Customer Deposits	(648)	
Amortization of Excess DFIT	1,536	
Proforma Interest	9,772	
12/83 Tariff Change	(1,084)	
RL & ELG—1984	(10,877)	
Total Adjustments		(7,931)
Adjusted Net Operating Income		82,786

D. Fair Rate of Return

The determination of the fair rate of return is also influenced by divestiture and deregulation. In the past, the Commission has regulated South Central Bell on the basis of a reasonable capital structure for the Bell System. The company has now been divested and is wholly owned by BellSouth. In addition, the Commission now must determine a reasonable return on equity for the divested company rather than for a company that is part of the Bell System.

Dr. Richard L. Lurito, a consultant of the Commission, testified that a reasonable capital structure for BellSouth would include 45 per cent long term debt, 6 per cent short term debt and 49 per cent common equity. In the 1980 South Central Bell case, Docket No. U-14673, this Commission used a capital structure containing only 45 per cent equity for regulatory purposes; this capital structure was also used in the last case. Thus, the recommendation of Dr. Lurito would permit a significant increase in the equity ratio.

Under the divestiture order of the federal court, the divested Bell subsidiaries were required to have equity ratios of at least 55 per cent. However, the divestiture order does not purport to determine a reasonable capital structure of these subsidiaries for regulatory purposes. The 55 per cent requirement is partly a function of the historic refusal of the Bell System to move toward a reasonable capital structure and the court's desire to avoid exploitation of the subsidiaries by AT&T. It is not binding on this Commission.

Dr. Lurito performed studies to determine whether his recommended capital structure provides adequate safety to South Central Bell and found that it ensures more than a reasonable margin of safety. This finding is especially supportable because other utilities in this State with fewer assets and greater risk than South Central Bell are able to obtain reasonable financing with equity ratios below 40 per cent. The Commission is reluctant to approve any increase in the equity ratio, but will adopt the recommendation of Dr. Lurito for this case with the provision that to conform to the regulatory goal in this State, the utility plan its future financing to achieve the most economical capital structure and equity ratio.

Dr. Lurito also provided the proform cost of debt of South Central Bell and BellSouth and indicated that it may be preferable to use the cost rates of South Central Bell until experience shows the effect on the BellSouth cost rates of its creation of certain new subsidiaries. The Commission will accept this recommendation, at least for this case.

The following recommendations were submitted for the fair rate of return on equity:

Mr. J. D. Matheson, Jr., the witness of South Cental Bell	16-18%
Dr. Lurito	15%
Mr. Mark Langsum, the witness of the U.S. Army	13.5-14.5%

In evaluating these recommendations, the Commission is mindful of the following tenets. First, the company is entitled to earn a rate of return that is "commensurate with returns on investment in other enterprises having corresponding risks" and "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain credit and to attract capital." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S.Ct. 281, 288 (1944). This, however, is but the first part of the Commission's inquiry. The Commission is also bound to "provide appropriate protection to the relevant public interests, both existing and foreseeable." *In re Permian Basin Area Rate Cases,* 390 U.S. 747, 792, 88 S.Ct. 1344, 1373 (1968). Furthermore, the Commission is bound to assess these requirements of the broad public interest "at each step of its regulatory process." 390 U.S. at 791, 88 S.Ct. at 1372. A balance must thus be struck between investor and consumer interests.

Second, unamortized investment tax credits constitute approximately 8.1 per cent of South Central Bell's total investor-supplied capital. If such unamortized investment tax credits are not deducted from the Company's rate base, South Central Bell will in fact be permitted the opportunity to earn a higher rate on its *actual* equity investment. Although these unamortized investment tax credits are treated as if they were investor-supplied, they actually have zero cost to the Company. If the unamortized investment tax credits are deducted from rate base, there might be a disadvantageous tax consequence. However, the Commission is not precluded from considering this factor in determining the rate of return on equity that will ensure the financial integrity of the utility.

Third, inflation continues to be relatively low. Investors are receiving a higher *real* return on their investment than they have for some time. The use of historic studies concerning the investor's required rate of return may overstate the real return requirement.

Fourth, the preliminary injunction requires the Commission to permit faster capital cost recovery methods than historically have been allowed. The increase in cash flow of $62.7 million annually reduces the investment risk of South Central Bell and gives it a better "quality" of earnings.

In the final analysis, the fair rate of return on equity is a matter of regulatory judgment. This rate of return will be fixed at 14.75 per cent. The overall fair rate of return is 11.82 per cent.

E. Revenue Requirement.

To produce the fair rate of return, a rate increase of $126,393,000 is required after reflecting the fact that access rates charged to interexchange carriers will produce $128,790,000 of revenues, as discussed below. South Central Bell has assured the Commission that it will pursue a construction program costing $300 million or more in the next 12 months, allowing it to improve and upgrade the quality of service in this State. The Company will be required to perform this undertaking, especially in light of the rate relief provided in this order.

III. ADDITIONAL MATTERS.

The following additional matters must be dealt with in this Order.

First, divestiture and deregulation have created a new telephone company and shifted much of the burden of paying for telecommunications services among classes of customers. New issues in rate design are presented. The goal of universal service is threatened by the spectre of so-called "competition," which in the world of the telephone company mandates increases rather than decreases in price. A full analysis of these issues is necessary. Therefore, the Staff is directed to receive evidence and make recommendations concerning these matters. However, the Commission hereby orders that the increase applied to residential exchange service not exceed $2.00 per month and the increase to business exchange service not exceed $4.00 per month, and authorizes the implementation of these two tariffs.

Second, pursuant to the recommendation of Bruce

M. Louiselle, a Commission consultant, and the current cost study showing the need for $128,790,000 in revenue resulting from the loss of the toll services of South Central Bell, the access charge assessed to interexchange carriers will be fixed at $128,790,000. The so-called threat of "bypass" has not been shown to be serious enough to justify reducing these tariffs any further.

Third, the Commission is concerned that accounting guidelines be developed to ensure that interexchange carriers bear the full cost of ensuring "equal access" pursuant to the divestiture order. In the continuing proceedings, the Staff is directed to analyze this issue and make recommendations.

Fourth, the Commission Staff is directed to conduct an examination of the contracts between AT&T and South Central Bell for the use of multifunction plant to determine their reasonableness and the extent to which the divestiture order affects the freedom of the Commission to adjust these expenses for regulatory purposes.

Fifth, South Central Bell will from time to time be required to construct projects to serve the needs of interexchange customers. Procedures must be developed to permit regulatory scrutiny of these projects and the compensation received from AT&T and other carriers. The staff should analyze these issues in the continuing proceeding.

IV. CONCLUSION

For the foregoing reasons,

IT IS ORDERED that South Central Bell Telephone Company will be permitted to raise its intrastate rates in

the gross amount of $126,393,000. After the implementation of the increase, $62.7 million of the revenues of South Central Bell will be subject to refund. In addition, these proceedings shall remain open to formulate recommendations regarding the other issues described in this Order. The Company is also ordered to expend at least $300 million on construction, to improve and upgrade service, in the 12 months beginning September 1, 1984.

BY ORDER OF THE COMMISSION:
BATON ROUGE, LOUISIANA
OCTOBER 1, 1984

/s/ GEORGE J. ACKEL
CHAIRMAN

/s/ JOHN F. SCHWEGMANN
John Schwegmann concurs in part and dissents in part.*
VICE CHAIRMAN

/s/ Ed Kennon dissents.
COMMISSIONER

/s/ THOMAS E. POWELL
COMMISSIONER

/s/ LOUIS J. LAMBERT
COMMISSIONER

/s/ LOUIS S. QUINN
SECRETARY

* Commissioner Schwegmann concurs in all parts of this Order except the decision to approve an additional $21.72 million in depreciation expense for 1984 represcriptions approved by the FCC. Commissioner Schwegmann would approve this additional expense only if it were mandated by the courts. Commissioner Schwegmann would approve a rate increase of $104,673,000.

* Commissioner Lambert concurs in all parts of this Order except the decision to approve an additional $21.72 million in depreciation expense for 1984 represcriptions mandated by the FCC. Commissioner Lambert would deny the depreciation expense. However, Commissioner Lambert agrees that a rate increase of $126,393,000 is necessary to ensure the financial viability of the telephone company and permit it to make necessary capital expenditures. Therefore, Commissioner Lambert joins Commissioners Ackel and Powell in approving a rate increase of $126,393,000.

APPENDIX "E"
STATUTES INVOLVED

47 U.S.C. §152(a):

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

47 U.S.C. §153(i), (t):

For the purpose of this chapter, unless the context otherwise requires—

(i) "Person" includes an individual, partnership, association, joint-stock company, trust, or corporation.

(t) "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.

47 U.S.C. §401(b):

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any

party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

47 U.S.C. §413:

It shall be the duty of every carrier subject to this chapter, within sixty days after the taking effect of this chapter, to designate in writing an agent in the District of Columbia, upon whom service of all notices and process and all orders, decisions, and requirements of the Commission may be made for and on behalf of said carrier in any proceeding or suit pending before the Commission, and to file such designation in the office of the secretary of the Commission, which designation may from time to time be changed by like writing similarly filed; and thereupon service of all notices and process and orders, decisions, and requirements of the Commission may be made upon such carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the District of Columbia, with like effect as if made personally upon such carrier, and in default of such designation of such agent, service of any notice or other process in any proceeding before said Commission, or of any order, decision, or requirement of the Commission, may be made by posting

such notice, process, order, requirement, or decision in the office of the secretary of the Commission.

47 U.S.C. §416(a):

(a) Every order of the Commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law.

Supreme Court, U.S.
FILED
JUN 10 1985
ALEXANDER L. STEVAS
CLERK

NO. 84-870

In the Supreme Court of the United States

October Term, 1984

LOUISIANA PUBLIC SERVICE COMMISSION, THOMAS E. POWELL, GEORGE J. ACKEL, ED KENNON, LOUIS LAMBERT AND JOHN F. SCHWEGMANN,

Appellants

versus

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Appellee

On Appeal from the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM AND RESPONDING TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This reply brief is submitted on behalf of the Louisiana Public Service Commission ("Louisiana Commission"), appellant, to respond to certain arguments raised in the motion to dismiss or affirm of South Central Bell Telephone Company ("South Central Bell"), appellee, and the Brief for the United States as Amicus Curiae, submitted jointly by the Solicitor General and the Federal Communications Commission (collectively, "the Government").

ARGUMENT

1. South Central Bell and the Government suggest that the decision of the court of appeals is not appealable pursuant to 28 U.S.C. §1254(2) because it is not "final," but affirms a preliminary injunction. Motion at 13-14; Gov't Brief at 17-18 n.9. In support of this position, they cite *Slaker v. O'Connor*, 278 U.S. 188 (1929), decided under the predecessor provision to 28 U.S.C. §1254(2), and *South Carolina Electric and Gas Co. v. Flemming*, 351 U.S. 901 (1956), which dismissed an appeal, citing *Slaker*, without comment. In both *Slaker* and *South Carolina Electric*, decisions of district courts granting motions for dismissal were reversed by the courts of appeals and the cases remanded for further proceedings. Neither case involved a decision to affirm a preliminary injunction invalidating a state law as unconstitutional.

South Central Bell and the Government concede that the supposed "finality" requirement has been questioned by the Court. Motion at 13; Gov't Brief at 17 n.9. Section 1254(2) contains no finality requirement, unlike other jurisdictional statutes. *See* 28 U.S.C. §§1257, 1291. In *Doran v. Salem Inn, Inc.*, 422 U.S. 931 (1975), this Court treated as an open question the issue of whether a decision affirming a preliminary injunction is appealable when the ruling invalidates a state law, but declined to resolve the issue. *Id.* at 927. Moreover, even in cases when it assumed the existence of a "finality" requirement, the Court has applied a practical rather than technical test. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 301-02 (1976); *City of Chicago v. Atchison, T. & S.F. Ry. Co.*, 357 U.S. 77, 82-83 (1958).

In this case, the decision of the court of appeals affirms a decision invalidating state ratemaking orders and requiring state regulators to implement a rate increase to fund new accounting practices prescribed by the FCC. No remand has been ordered; no further proceedings are scheduled, and it is unlikely that a trial on the merits will ever occur, even if the decision below is affirmed. The jurisdictional and rate of return issues are ripe for review. Therefore, any "finality" requirement implicit in Section 1254(2) is satisfied.

2. In arguing that a state commission is a "person" subject to an enforcement proceeding under 47 U.S.C. §401(b), South Central Bell states that Section 401(b) should be compared with the provision authorizing enforcement of orders of the Interstate Commerce Commission, 49 U.S.C. §16(12), on which Section 401(b) was modeled. The enforcement provision of the Interstate Commerce Act permits a private party action only against a "carrier." Since Section 401(b) uses "person" rather than "carrier," South Central Bell infers that "Congress intentionally expanded the class of defendants against whom injunctions could issue under §401(b)." Motion at 19. This interpretation is erroneous. In the Communications Act, Congress gave the FCC regulatory authority not only over communications common carriers, but over parties engaged in radio *broadcasting. See* 47 U.S.C. §301 *et seq.* The use of "person" rather than "carrier" permits enforcement actions against both types of regulated entities.

South Central Bell is correct, however, in noting that Section 401(b) was modeled after 49 U.S.C. §16(12). Both sections are designed only to authorize private party enforcement suits against regulated parties. Congress had no

intention of permitting federal court actions against state regulatory commissions to require intrastate rate increases deemed appropriate by the FCC.

3. The Government argues that the court of appeals correctly interpreted *Ambassador, Inc. v. United States*, 325 U.S. 317 (1945), as permitting a suit to enforce a rulemaking "order" pursuant to Section 401(b), and that the First Circuit's distinction of *Ambassador, Inc.* is incorrect. Gov't Brief at 11. *Ambassador, Inc.* was a suit instituted by the United States at the request of the FCC. 325 U.S. at 318. The FCC had issued an order to two telephone companies requiring the filing of a tariff to regulate the charges assessed by hotels to their guests; the telephone companies complied by filing a tariff. *Id.* at 320-21. The suit was filed against the telephone companies and 27 hotels to enjoin the hotels from collecting charges from their guests in excess of the tariff and to enjoin the telephone companies from providing service to hotels that did not comply with the tariff. The district court issued an injunction only against the hotels, and the ruling was affirmed.

Contrary to the argument of the Government and the analysis of the court of appeals, *Ambassador, Inc.* could not have been a Section 401(b) proceeding. First, the case did not involve an "order" issued to the hotels made subject to the injunction; the injunction instead required the hotels to comply with a tariff filed by the telephone companies. Second, there is no indication in *Ambassador, Inc.* that the tariff or any FCC "order" was "duly served" on the hotels, as required by Section 401(b). Third, the Court specifically indicated that the enforcement proceeding was brought to secure compliance with the Communications

Act, as authorized by Section 401(a): "Since the regulation, apart from questions of reasonableness which must be presented to the Commission, is a valid regulation of the subscriber's use of telephone facilities involved, a departure from the regulation is forbidden by the Act and the prosecution of an action to restrain a violation is authorized." *Id.* at 325.

The determination of the court of appeals that "§401(a) only authorizes a district court to enjoin violations of the Act itself," and not violations of regulations, is inconsistent with *Ambassador, Inc.* 744 F.2d at 1117, App. at A-19. Moreover, the court of appeals engaged in circuitous and self-serving reasoning in rejecting the First Circuit's interpretation that *Ambassador, Inc.* may have been brought under Section 401(a). The court of appeals apparently conceded that a violation of a regulation is a violation of the Act, but held: "We think it is clear...in light of the existence of §401(b), that the scope of a district court's authority under Section 401(a) is limited to enjoining violations of specific provisions of the Act and not rulemaking orders or tariff regulations." 744 F.2d at 117 n.18. This restrictive view of Section 401(a), of course, depends on an unduly expansive interpretation of Section 401(b); the court of appeals assumed its own answer to the issue in the logical process of finding the answer.

Nor does *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), mandate an interpretation permitting the enforcement of rulemaking "orders" pursuant to Section 401(b). In *CBS*, this Court held that a rulemaking "order" is reviewable pursuant to 47 U.S.C. §402. The Court relied on the practical harm caused to CBS by the substantive legal interpretation of the FCC. The Court im-

plicitly recognized, however, that the rulemaking "order" at issue was not the type of "order" that could be enforced against CBS. It stated:

> Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act.

Id. at 422. Therefore, *CBS* is not authority for interpreting Section 401(b) to apply to general rulemaking orders.

4. With an eye toward avoiding review of the FCC's *Preemption Decision* in *Louisiana Public Service Commission v. FCC*, No. 84-871 *et al.*, the Government assures the Court that the *Preemption Decision* was not intended to "se[t] intrastate telephone rates." Gov't. Brief at 19. Instead, the Government states that its only disagreement with the Louisiana Commission on the rate of return issue is "whether the state commission's abrupt adjustment of the rate of return...was correctly characterized as disobedience to the district court's injunction... ." *Id.* at 20. Yet the Louisiana Commission could have "disobeyed" the district court's injunction, which enforced the *Preemption Decision*, only if the *Preemption Decision* and the injunction required a dollar-specific increase in intrastate rates.

Nor should the Court be distracted from the substantive issue by the assertions that the Louisiana Commission "held no hearing and considered no new evidence before adjusting the rate of return" and "presented its argument that the adjustment was warranted in light of reduced investor risk caused by the change in depreciation practices

for the first time in its reply brief in the court of appeals." *Id.* First, the Louisiana Commission had only 10 days to comply with the district court's first injunction; there was no opportunity to conduct rate of return hearings. Second, the Commission had before it the record in an entire rate case, including evidence relating to rate of return and risk. Third, the Louisiana Commission provided brief reasons for its decision in its order issued to comply with the initial injunction. App. at A102, A104-05.

Fourth, it is not true that the issue of reducing the rate of return for reduced risk relating to increased cash flow was raised for the first time in the reply brief filed with the court of appeals, although the Louisiana Commission did not brief the issue in its initial brief in the court of appeals. In the district court, the issue was raised and extensively briefed by South Central Bell in an effort to obtain a dollar-specific injunction. In attacking the testimony of Bruce M. Louiselle, a consultant of the Louisiana Commission, South Central Bell stated: "[In a Maryland case] the Office of People's Counsel took the position, again advanced in this case by Mr. Louiselle, that offsetting adjustments in the rate of return and in other areas should be made... ." R., Post-Hearing Memo. of South Central Bell at 20. The company reviewed two regulatory decisions and concluded: "[T]here is no merit to the argument advanced by Mr. Louiselle that the required rate of return is impacted by recognizing these increased expenses and providing revenues to offset them." *Id.* at 22.

The double-edged message inherent in the court of appeals' decision and the Government's brief is this: "We are not in the business of intrastate ratemaking, nor have we precluded the state commissions from adjusting the

rate of return, but if these commissions do not raise intrastate rates to cover every dollar of increased expense resulting from federally-prescribed accounting practices within 10 days, or alternatively, conduct hearings and receive new evidence within 10 days, and offer reasons based on the new evidence that are satisfactory to us for adjusting the rate of return, they violate our orders." The decision represents an unauthorized intrusion into intrastate ratemaking.

5. The use of Section 401(b) to require an intrastate rate increase is unauthorized and unduly strains federal-state relations. Once it entered the intrastate regulatory thicket to require the use of federally-prescribed accounting practice, the district court became entangled with other issues. The district court and court of appeals differed on the justification for the federal rate of return decision, and the Government offers an explanation that attempts to water down the decision of the court of appeals. This confusion underscores the wisdom of leaving intrastate ratemaking to state agencies and courts and, if any federal practices may be imposed on the state commissions, leaving enforcement to the state courts.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
JAN 7 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

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Appellants,

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

---

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DATED: January 7, 1985

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-870

LOUISIANA PUBLIC SERVICE COMMISSION, THOMAS E. POWELL, GEORGE J. ACKEL, ED KENNON, LOUIS LAMBERT AND JOHN F. SCHWEGMANN,

Appellants,

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

The National Association of Regulatory Utility Commissioners (hereinafter referred to as NARUC) hereby submits its brief as amicus curiae in support of the Jurisdictional Statement filed by the Louisiana Public Service Commission, *et al.*, seeking review of the decision of the United States Court of Appeals for the Fifth Circuit in *South Central Bell Telephone Company v. Louisiana Public Service Commission,* attached as A-1 to the Jurisdictional Statement filed herein. The NARUC files this

brief with the written consent of the Appellants and the Appellee.

INTEREST OF AMICUS CURIAE

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of utilities and carriers. The Louisiana Public Service Commission (hereinafter referred to as the Louisiana PSC), Appellant herein, is a member of the NARUC. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating telecommunications within their respective borders. As such, these officials have the obligation to assure the establishment of telecommunications services and facilities as may be required by the public convenience and necessity, and the furnishing of dependable service at rates that are just and reasonable.

The decision of the U.S. Court of Appeals for the Fifth Circuit which Appellant seeks to have overturned concerns a decision of the Federal Communications Commission (hereinafter FCC or Commission) which preempts the States from the exercise of authority over intrastate depreciation rate prescription. Amendment of Part 31, *Memorandum Opinion and Order,* 92 FCC2d 864 (1983) (A-57). The authority to prescribe intrastate depreciation rates is crucial to the ability of the States to discharge their statutorily-imposed duty to assure that intrastate telecom-

munications service is provided at rates and charges that are just and reasonable. The FCC's preemptive action severely infringes upon the ability of the States to discharge this duty. The NARUC therefore has an important interest in the outcome of this case which is of obvious nationwide significance.

The Fifth Circuit decision at issue here is just one in a group of cases which have arisen as a result of the FCC's intrastate depreciation preemption decision. The volume of litigation surrounding this issue illustrates the seriousness with which the States view the FCC's unlawful intrusion into their regulatory sphere. Five additional cases are currently pending before this Court.

Two of these cases concern direct challenges to the FCC's preemption decision. In *California and Public Utilities Commission of California, et al. v. FCC,* No. 84-889 (U.S. filed Dec. 12, 1984), the NARUC, along with the California PUC and fourteen other State commissions and consumer representatives, has asked this Court to issue a petition for writ of certiorari to the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit had previously issued a 2-1 decision upholding the FCC's preemptive action. *Virginia State Corporation Commission v. FCC,* 737 F.2d 388 (1984). In *Louisiana Public Service Commission v. FCC,* No. 84-871 (U.S. filed Nov. 30, 1984), the Louisiana PSC has filed a direct appeal to this Court of the same Fourth Circuit decision. Oppositions have yet to be filed in either case.

The remainder of the cases which have already reached this Court have arisen in the same way as the instant case. The involved State utility bodies have refused to recognize the validity of the FCC's preemptive action. In all but one instance, these utility commissions have had injunction

suits initiated against them by their local telephone companies in the federal district courts pursuant to 47 U.S.C. section 401(b). In the first of these cases, the Arkansas PSC has asked this Court to issue a petition for writ of certiorari to the U.S. Court of Appeals for the Eighth Circuit which had issued a decision holding that the district court below had abused its discretion in refusing to enjoin the PSC from nonadherence to the FCC's decision. *Southwestern Bell Tel. Co. v. Arkansas PSC,* 584 F.Supp. 1087 (D. Ark.), *rev'd,* 738 F.2d 901 (8th Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3290 (U.S. Oct. 16, 1984) (No. 84-483). In issuing its decision, the Eighth Circuit determined that the FCC's preemption decision constituted an enforceable "order" within the meaning of section 401(b).[1]

The Eighth Circuit's decision is in direct conflict with the decision of the First Circuit in *New England Telephone Co. v. Public Utilities Commission of Maine,* 570 F.Supp. 1558 (D. Me. 1983), *rev'd,* 742 F.2d 1 (1st Cir. 1984), *petition for cert. filed,* No. 84-900 (U.S. filed Dec. 5, 1984). The First Circuit has held that the FCC's decision does not constitute an enforceable "order" within the meaning of 47 U.S.C. §401(b). The First Circuit's decision is the subject of a petition for writ of certiorari recently filed by New England Telephone. The First Circuit's decision is also in direct conflict with the decision of the Fifth Circuit at issue here.

The final case to have already reached this Court involves the decision of the Ohio PUC to refuse to recognize the FCC depreciation decision. Cincinnati Bell appealed

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[1]The NARUC, joined by eighteen State utility commissions and consumer representatives, has filed an amici curiae brief in support of the Arkansas PSC's petition.

the Ohio PUC's decision to the Ohio Supreme Court which held that the State commission was not obligated to follow the FCC's rulemaking action. Cincinnati Bell has filed an appeal with this Court seeking reversal of the Ohio Supreme Court decision. *Cincinnati Bell Telephone Co. v. Ohio Public Utilities Commission,* 12 Ohio St. 3rd 380 (1984), *appeal docketed,* 53 U.S.L.W. 3343 (U.S. Oct. 6, 1984) (No. 84-623).

At least five other cases involving the same issue are currently being litigated in the lower federal courts. *New England Telephone v. Public Service Board of Vermont,* 576 F.Supp. 490 (D. Vt. 1984), *appeal pending,* No. 84-7051 (2nd Cir. filed June 27, 1984); *Chesapeake & Potomac Telephone Co. v. Maryland Public Service Commission,* 560 F.Supp. 844 (D. Md. 1983), *aff'd,* ____ F.2d. ____ (4th Cir. Nov. 20, 1984); *Wisconsin Bell v. Public Service Commission of Wisconsin,* No. 84-C-0004 (D. Wisc. decided Nov. 13, 1984); *Northwestern Bell Tel. Co. v. Iowa State Commerce Commission,* No. 83-688-A (S.D. Iowa decided Sept. 27, 1984); *Pacific Northwest Bell v. Washington Utilities & Transportation Commission,* 565 F.Supp. 17 (W.D. Wash. 1983), *appeal pending,* No. 83-3746 (9th Cir. filed April 19, 1983). Some or all of these cases will also eventually be brought to this Court for decision.

The extensive litigation surrounding this issue has created a host of problems. The uncertainty which exists while a suit is pending coupled with the inequities which result from conflicting federal court determinations has created an unhealthy situation for State utility commissions, local telephone companies, consumers and federal-State relations. The NARUC respectfully submits that this Court must exercise its jurisdiction over the myriad cases involving this issue, including the instant case, to deter-

mine the proper scope of 47 U.S.C. section 401(b) and, more broadly, the legality of the FCC's depreciation preemption decision.

SUMMARY OF ARGUMENT

The Fifth Circuit was incorrect in concluding that a State public utility commission constitutes a "person" within the meaning of 47 U.S.C. section 401(b). "Person" is defined for purposes of section 401(b) in 47 U.S.C. section 153(i). "State commission" is not contained in section 153(i). It is defined instead separately in a succedent subsection. This Court must not confer authority on the federal district courts to enforce FCC decisions against State utility commissions on the strength of an expanded definition of "person" that clearly reaches beyond the language of the Communications Act.

The Fifth Circuit was also incorrect in concluding that the FCC's preemption decision constitutes an enforceable "order" within the meaning of section 401(b). The FCC's decision was the product of a rulemaking proceeding and fits the Administrative Procedure Act's definition of a "rule". 5 U.S.C. section 551(4). Only an adjudicatory order, and not a rule, may be enforced by private parties under section 401(b) as an "order". 5 U.S.C. section 551(6).

Finally, even if one assumes that section 401(b) permits the enforcement of the FCC's preemption decision against a State commission, the scope of this section was exceeded by the Fifth Circuit in upholding the district court's issuance of a dollar-specific rate injunction requiring the Louisiana PSC to adhere to a previously authorized rate of return. Section 401(b) does not permit the federal courts to review ratemaking decisions that extend beyond

the FCC's decision being enforced. Since the FCC's depreciation decision extended only to determinations concerning depreciation methodology, the action of the Fifth Circuit in upholding the district court's determination as to what a fair rate of return should be for South Central Bell was improper.

ARGUMENT

A. A State Utility Commission Does Not Constitute a "Person" Within the Meaning of Section 401(b).

Section 401(b), 47 U.S.C. section 401(b) provides as follows:

> If any person fails or neglects to obey any order of the Commission other than for the payment of money . . . any party injured hereby . . . may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of same, the court shall enforce obedience to such order . . .

"Person" is defined for purposes of those provisions of the Communications Act regulating wire and radio communication by section 153(i) as follows:

> "Person" includes an individual, partnership, association, joint-stock company, trust, or corporation, . . .
>
> 47 U.S.C. section 153(i).

"State commission" is not listed within this definition. In fact, "State commission" is specifically defined by Congress in a succedent subsection.

> "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.
>
> 47 U.S.C. section 153(t).

The Fifth Circuit has equated a "State commission" as defined in 47 U.S.C. section 153(t) to a "person" beyond the definition given in the preceding subsection (i). Neither the language nor the history of the Communications Act justifies this action. To include a State utility commission within the same class defined by the words "an individual, partnership, association, joint-stock company or corporation" "offends the traditional canon of statutory construction expanding the general terms beyond the specific words which follow." *New England Telephone Co. v. Public Service Board of Vermont,* 576 F.Supp. 490, 495 (D. Vt. 1984), *appeal pending,* No. 84-7051 (2nd Cir. filed June 27, 1984). Furthermore, as determined by the U.S. District Court for the District of Vermont:

> The statutory scheme offers no suggestion that the provisions of 47 U.S.C. section 401(b) was designed to make injunctive relief available against a State regulatory agency at the instance of a regulated carrrier who asserts it is aggrieved by the State ratemaking process.
>
> *Id.*

This Court must not ascribe an intent on the part of Congress to confer authority on the federal district courts to enforce rulemaking decisions of the FCC against the State utility commissions "on the strength of an expanded definition of 'person' that clearly reaches beyond the language of section 3 of the Act [47 U.S.C. section

153(i)]." *Id.* at 494. The conclusion of the Fifth Circuit must be rejected and the rationale put forth by the District Court for Vermont should be adopted by this Court.

B. The FCC's Preemption Decision Does Not Constitute an Enforceable "Order" Within the Meaning of Section 401(b).

The word "order" in section 401(b) does not include an FCC decision of the sort at issue here. The decision at issue is the product of a rulemaking proceeding, namely the amendment of Part 31 of the FCC's rules. It fits the Administrative Procedure Act's (APA) definition of a "rule". It is "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." 5 U.S.C. section 551(4). Only an adjudicatory order, and not a rule, may be enforced by private parties under section 401(b) as an "order."

The APA defines the word "order" as "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency *in a matter other than rulemaking* . . ." 5 U.S.C. section 551(6) (emphasis supplied). Although this definition applies to the APA and not necessarily to the Communications Act, which was enacted twelve years earlier, the APA was the product of extensive study of preexisting procedure. *New England Telephone Co. v. Public Utilities Commission of Maine,* 742 F.2d 1, 5 (1st Cir. 1984), *petition for cert. filed,* No. 84-900 (U.S. filed Dec. 5, 1984).

As determined by the First Circuit, whose holding is in direct conflict with the decision of the Fifth Circuit at issue here, this construction of section 401(b) is essential to preserve procedural fairness to parties. Noting that review

of the agency order for which enforcement is sought in a district court under section 401(b) is reserved to circuit courts of appeal under 28 U.S.C. section 2342(1), the First Circuit stated:

> This "split" of power between circuit and district courts (leaving 'review' to the first and 'enforcement against the disobedient' to the second) makes a degree of sense where an 'adjudicatory' order is at issue, for the 'disobedient person' in such a case was likely a party to the order and might have sought review of the agency decision in the circuit court. It makes far less sense and is far less fair in the case of an agency rule, which might well be enforced against persons not parties to the rulemaking proceeding.
>
> *Id.* at 6-7.

In addition, to interpret "order" in section 401(b) broadly enough to encompass rules "threatens the sound development of a coherent nationwide communications policy — a central objective of the 1934 Act." *Id.* at 5. Rules are usually highly general in form and content. To apply a rule in a given factual situation usually involves interpretation of its scope and meaning.

> To construe 401(b) to include a private right to enforce commission rules would place this interpretative function squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission. At best, responsibility for uniform policy would rest on the shoulders of an overworked (an inexpert) Supreme Court. The result would be to deprive the FCC of necessary flexibility and authority in creating, interpreting, and modifying communications policy.
>
> *Id.* at 6.

Furthermore, 47 U.S.C. section 401(b) also requires that a party must fail or neglect to "obey an order" of the FCC before injunctive relief is available. Both common sense and federal jurisprudence dictate that to be in violation of an "order" one must have been directed to do or not to do a certain act. The cases decided pursuant to the forerunner of section 401(b), 49 U.S.C. section 16(12), required that the party sought to be enjoined must be in violation of an order or directive commanding the party to take or not take some action. *See e.g. McFaddin Express, Inc. v. Adley Corp.*, 346 F.2d 424 (2d Cir. 1965), *cert. denied,* 382 U.S. 1026 (1966); *ICC v. Western N.Y. & P.R. Co.*, 82 F.192 (W.D. Pa. 1897). The FCC's preemption ruling did not direct the Louisiana PSC nor any other State commission to do anything. It merely constituted the FCC's view as to the rule of law on the depreciation issue. As such, it is not properly enforceable as an order within the meaning of section 401(b).

C. The District Court Exceeded Its Authority Under Section 401(b) by Issuing a Dollar-Specific Rate Injunction Which Overruled a Louisiana PSC Rate of Return Decision.

Even if one assumes that section 401(b) permits the enforcement of the FCC's preemption decision against a State commission, the scope of this section was exceeded by the Fifth Circuit in upholding the district court's issuance of a dollar-specific rate injunction requiring the Louisiana PSC to adhere to a previously authorized rate of return. Section 401(b) does not permit the federal courts to review ratemaking decisions that extend beyond the FCC decision being enforced. This section only allows for "the enforcement of such order."

In its preemption decision, the FCC specifically disavowed any intention to affect any more than the "single issue" of depreciation methodology. The Commission stated:

> Section 220(b) only prohibits the States from setting depreciation rates for telephone property inconsistent with those prescribed by the FCC. It does not require any particular tariff for intrastate service be accepted by the State commissions. *The setting of depreciation rates and classes of depreciable property only resolves a single issue impacting the ratemaking process. It does not restrict the State commission's broad discretion in setting charges for individual services.*
>
> *Amendment of Part 31,* 92 FCC2d 864, para. 30 (1983) (A-74) (Emphasis supplied).

Moreover, Counsel for the FCC expressly disclaimed any interest in a dollar-specific injunction in argument to the district court:

> THE COURT: As far as the rest of the case is concerned, you are not particularly interested in whatever specific increase, if any, is ordered into effect, insofar as the intrastate operation with South Central Bell is concerned?
>
> MR. INGLE: No, Sir; we're not interested in the specific numbers. I think we would see an appropriate order in this case as one which enjoins the Louisiana Commission – perhaps, in some rather vague sense – to issue a rate order which, whatever else it does, follows and obeys the FCC's depreciation rules . . .
>
> Record at 40-1, *South Central Bell.*

Since the scope of the FCC's preemption decision extended only to determinations concerning depreciation methodology, the action of the Fifth Circuit in upholding the district court's determination as to what a fair rate of return should be for South Central Bell was improper.

In addition, the Louisiana PSC is the body constitutionally authorized to set just and reasonable rates for regulated utilities offering intrastate services in the State of Louisiana. La. Const. Art. IV, §21. If a regulated utility is dissatisfied with an order of the Louisiana PSC it may challenge that order pursuant to La. R.S. §45:1192, 1194 and La. Const. Art. IV, §21(E). That remedy is complete and efficient.

The authority of the State public utility commissions to regulate intrastate rates and charges for regulated utilities is recognized by Congress in Section 152(b) of the Communications Act, 47 U.S.C. section 152(b).

> (b) . . . nothing in this chapter shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier . . .

The decision of the Fifth Circuit approving the raising of intrastate rates in the amount of $40,506,000 was an exercise of jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." As such, it was clearly prohibited by the Communications Act.

CONCLUSION

For all of the foregoing reasons, the Court should give the three issues raised by Appellant plenary consideration.

Respectfully submitted,

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(H) (6) (4)

Nos. 84-483, 84-870 and 84-900

Office-Supreme Court, U.S.
FILED
MAY 23 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

ARKANSAS PUBLIC SERVICE COMMISSION, ET AL.,
PETITIONERS

v.

SOUTHWESTERN BELL TELEPHONE COMPANY

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.,
APPELLANTS

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY

NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY, PETITIONER

v.

PUBLIC UTILITIES COMMISSION OF MAINE, ET AL.

ON APPEAL AND ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIRST, FIFTH AND EIGHTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a district court asked to enforce an order of the Federal Communications Commission (FCC) under 47 U.S.C. 401(b) may deny enforcement on the ground that the order is ultra vires, where exclusive jurisdiction to determine the lawfulness of FCC orders rests in the courts of appeals, a petition for review of the pertinent FCC order is pending in a court of appeals at the time enforcement is sought in a district court, and a stay could be sought in the court of appeals.

2. Whether the Federal Communications Commission's order preempting inconsistent regulation by state commissions is an "order" that may be enforced under 47 U.S.C. 401(b).

3. Whether a district court exceeded its authority to enforce an order of the Federal Communications Commission by requiring a state commission to permit a telephone company to increase its rates by a specific amount so as to comply with depreciation methods prescribed by the Federal Communications Commission.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-483

ARKANSAS PUBLIC SERVICE COMMISSION, ET AL., PETITIONERS

v.

SOUTHWESTERN BELL TELEPHONE COMPANY

No. 84-870

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL., APPELLANTS

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY

No. 84-900

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, PETITIONER

v.

PUBLIC UTILITIES COMMISSION OF MAINE, ET AL.

ON APPEAL AND ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIRST, FIFTH AND EIGHTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitations to the Solicitor General to express the views of the United States.

STATUTES INVOLVED

Relevant statutes are set forth in the petitioners' appendix (at A71-A74) in No. 84-483.

STATEMENT

The Federal Communications Commission (FCC) determined in 1983 that state commissions could not order telephone companies to use depreciation methods contrary to those the FCC had prescribed. That order was affirmed on review by the Fourth Circuit, which had exclusive jurisdiction to determine the validity of the order and to stay or enjoin it pending review. The three cases addressed in this brief all involve disputes between telephone companies and state commissions that refused to permit the telephone companies to follow the depreciation methods prescribed by the FCC. In each case, the telephone company filed an enforcement action in a federal district court pursuant to 47 U.S.C. 401(b), seeking to compel the state commission to permit it to use the FCC's depreciation methods in state ratemaking proceedings. In the Arkansas case, No. 84-483, the Eighth Circuit overturned a district court order refusing to enforce the FCC's order on the ground that the decision was ultra vires. In the Maine case, No. 84-900, the First Circuit held that the FCC's decision that state commissions were preempted from requiring the use of inconsistent depreciation methods was not the type of "order" that telephone companies could enforce under Section 401 (b), and so it vacated an injunction issued by a dis-

trict court. In the Louisiana case, No. 84-871, the Fifth Circuit expressly rejected the First Circuit's conclusion in the Maine case and upheld an injunction issued by a district court.

1. Section 220(b) of the Communications Act of 1934, 47 U.S.C. 220(b), authorizes the FCC to prescribe "classes of property" for which depreciation may be charged and to prescribe depreciation procedures; it states that carriers "shall not" use any other classifications or depreciation procedures. In 1980, the Commission issued an order making two changes in the depreciation procedures used by telephone companies. *In re Property Depreciation*, 83 F.C.C.2d 267 (1980), reconsideration denied, 87 F.C.C.2d 916 (1981).[1] The next year, the Commission issued an order providing that a previously depreciable class of property should thenceforth be treated as a current expense. *In re Uniform System of Accounts*, 85 F.C.C.2d 818 (1981).[2] The Commission made each of these changes because it concluded that the prior practices had led to out-of-phase capital recovery and misallocation of costs, which conflicted with the FCC's recently adopted policy of en-

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[1] That decision substituted "equal life grouping" in place of "vintage grouping" and the "remaining life" method of correcting errors in forecasts in place of the "whole life" method. These depreciation rules are described briefly in our Motion to Dismiss and Brief in Opopsition at 5-6 [hereinafter cited as Fourth Circuit Opposition], in *Louisiana Public Service Comm'n* v. *FCC*, No. 84-871 et al., in which the appellant and the petitioners seeks further review in this Court of the Fourth Circuit's decision affirming the FCC's preemption decision.

[2] That decision determined that "inside wiring" should be treated as a current expense rather than capitalized. The decision is described briefly in our Fourth Circuit Opposition at 7.

couraging competition and otherwise were inconsistent with the public interest. The new depreciation methods are intended to make the marketplace operate more efficiently. 84-483 Pet. App. A19-A22.

The FCC, at the request of state commissions and telephone companies, considered whether its depreciation decisions prohibited states from requiring telephone companies to use inconsistent depreciation practices in state ratemaking proceedings. After first deciding that state commissions were not preempted (*In re Uniform System of Accounts*, 89 F.C.C.2d 1094 (1982)), the Commission unanimously determined that state commissions had to follow its recent depreciation decisions if the purposes of those decisions were not to be frustrated. The Commission also determined that Section 220(b), as a matter of law, ousted the states from any role in setting depreciation rates for telephone equipment used in part for interstate services unless the FCC expressly authorized such a role (84-483 Pet. App. A1-A34). The FCC gave general notice of this order (the *Preemption Order*) by publication in the *Federal Register* and by serving a copy of its order on each state commission (*id.* at A25).

Pursuant to the Administrative Orders Review Act of 1950, 28 U.S.C. 2341 *et seq.*, known as the Hobbs Act, a court of appeals may review an FCC order, such as the *Preemption Order*, if a petition is filed within 60 days. The court of appeals in which the petition is filed has "exclusive jurisdiction to make and enter * * * a judgment determining the validity of * * * the order of the agency" (28 U.S.C. 2349 (a)). A statutory transfer procedure provides that all review of an agency order may be centralized in one court of appeals (28 U.S.C. 2112(a)). That

court of appeals may stay the FCC order pending judicial review, on a proper showing (28 U.S.C. 2349 (b); Fed. R. App. P. 18).

The *Preemption Order* was appealed to the Fourth Circuit by the Virginia State Corporation Commission. The Louisiana commission and the Arkansas commission intervened in that proceeding and participated in the briefing, along with 15 other state commissions. None of the parties sought to stay the FCC's order. The Fourth Circuit upheld the *Preemption Order* in June 1984. Applying this Court's decision in *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 154 (1982), the court of appeals held that the FCC acted within the scope of its "authority to insure efficient operation of the interstate telephone network." *Virginia State Corporation Comm'n* v. *FCC*, 737 F.2d 388, 394 (4th Cir. 1984). A jurisdictional statement and three petitions for a writ of certiorari have been filed seeking review of that decision (Nos. 84-871, 84-889, 84-1054 and 84-1069).

2. The Arkansas case arose after the FCC's *Preemption Order* but prior to the Fourth Circuit's decision. A "three-way meeting" was held by the FCC, the Arkansas Public Service Commission, and Southwestern Bell.[3] Following the meeting, the FCC issued an order, in December 1983, prescribing depreciation rates for Southwestern Bell's operations in Arkansas. *In re Prescription of Revised Percentages of Depre-*

[3] The FCC historically has called periodic "three-way meetings" of telephone companies and federal and state regulators to consider depreciation rates for particular companies. See *In re Prescription of Revised Percentages of Depreciation*, 88 F.C.C.2d 1223, 1225 (1982).

ciation, 96 F.C.C.2d 257, 291 (1983). The order made clear that state commissions were required to follow the prescribed depreciation procedures (*id.* at 261-262 n.3). No party sought review of that order.

In January 1984, the Arkansas commission denied Southwestern Bell's rate proposal, which had sought to recover increases in depreciation expenses that the telephone company had calculated on the basis of the FCC's prescriptions. *Re Southwestern Bell Telephone Co.*, 58 Pub. Util. Rep. 4th (PUR) 82 (Ark. P.S.C. 1984). The Arkansas commission took "administrative notice" of the FCC's December 1983 depreciation order for Southwestern Bell's operations in Arkansas (*id.* at 90); but it refused to comply with that order and with the *Preemption Order*, stating that it was "convinced that the FCC is totally without any valid legal foundation to support its claim of preemption over the states with regard to intrastate depreciation rates" (*id.* at 93-94).

Southwestern Bell then sought enforcement of the FCC's orders in the United States District Court for the Eastern District of Arkansas under 47 U.S.C. 401(b). Section 401(b) provides that, if "any person fails or neglects to obey any order of the [FCC] * * * any party injured thereby * * * may apply to the appropriate district court of the United States for the enforcement of such order." The statute provides that the district court "shall enforce obedience to such order" if it finds that the order was "regularly made and duly served." The Arkansas commission stipulated that it was not obeying the *Preemption Order* and that the order was "regularly made and duly served." It disputed the FCC's authority to issue depreciation prescriptions that preempt state commissions.

The district court, in an opinion issued prior to the Fourth Circuit's decision upholding the *Preemption Order*, refused to enforce the FCC's orders. It noted that, under the Hobbs Act, "only a court of appeals may invalidate an FCC order" (Pet. App. A36). But the district court denied enforcement after determining that the *Preemption Order* was "ultra vires" because its prescription of uniform depreciation procedures necessarily affected intrastate ratemaking (*ibid.*).

The Eighth Circuit reversed (Pet. App. A43-A55). It noted that this Court had made clear, in *FCC* v. *ITT World Communications, Inc.*, No. 83-371, slip op. 4 (Apr. 30, 1984), that "[l]itigants may not evade" the provision of the Hobbs Act providing that exclusive jurisdiction to review FCC orders lies in the courts of appeals by arguing in a district court that an FCC order is ultra vires. But the district court had "countenanced just such an evasion" by the Arkansas commission (Pet. App. A50). The Eighth Circuit did not read the Hobbs Act as "withholding all discretion from the district court with respect to the issuance of an injunction," but concluded that, under the facts of this case, a refusal to enjoin the Arkansas commission's disobedience would be an abuse of discretion (*id.* at A54). The Eighth Circuit noted that the Arkansas commission was participating in the Fourth Circuit's review of the *Preemption Order* but had not sought a stay in that Court. The Eighth Circuit characterized the Arkansas commission's action as a "studied consideration of * * * defiance" of the FCC's order (*id.* at A54). It therefore ordered the district court to enter the injunction requested by Southwestern Bell, noting that it

could reconsider the injunction when the Fourth Circuit ruled on the validity of the *Preemption Order*.[4]

3. The Maine case arose in July 1982, when New England Telephone sought a rate increase from the Public Utilities Commission of Maine based on the depreciation methods prescribed by the FCC. As in the Arkansas case, the Maine commission refused to permit the telephone company to follow the FCC's prescriptions because it held that "the FCC erred" in concluding that it could issue preemptive depreciation prescriptions. *New England Telephone & Telegraph Co.*, No. 82-124 (Apr. 26, 1983), slip op. 36. New England Telephone filed an enforcement action under Section 401(b), and the United States District Court for the District of Maine issued an injunction instructing the Maine commission to permit the telephone company to use the depreciation practices prescribed by the FCC (Pet. App. 42c-44c).

The First Circuit reversed (Pet. App. 1a-14a). It held that the *Preemption Order* is not an "order" under Section 401(b). The court ruled that only "adjudicative orders," as opposed to orders resulting from rulemaking proceedings, may be enforced under that Section. The court recognized (Pet. App. 11a) that "our interpretation requires reading [order] differently" in Section 401 than this Court read the word "order" in Section 402 (47 U.S.C. 402) in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942). But the court found other argu-

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[4] On remand, and after the Fourth Circuit's decision, the district court issued an injunction instructing the Arkansas commission to permit Southwestern Bell to use the depreciation methods prescribed by the FCC for state ratemaking purposes.

ments persuasive. The court concluded that other sections of the Act "use the word 'order' in a way that seems to envision Commission decisions requiring specific actions of specific carriers," while the *Preemption Order* has general applicability (Pet. App. 10a). In the court of appeals' view, Section 401(b) "can be read more fairly and coherently" if "order" is narrowed to permit enforcement actions in district courts only of such specific orders (Pet. App. 9a). Furthermore, as a policy matter, the court thought it desirable to prohibit private parties from enforcing orders of general applicability so that the FCC could itself determine when enforcement actions regarding such orders were needed.

New England Telephone sought rehearing. It argued that its enforcement action could be viewed as an action enforcing a 1982 adjudicative order, *In re Prescription of Revised Percentages of Depreciation* (*1982 Prescription Order*), 92 F.C.C.2d 920 (1982), the type of order that the First Circuit concluded could be enforced by a private party under Section 401(b). The First Circuit issued a supplemental opinion rejecting this argument. It noted that the *1982 Prescription Order* "expressly left open" the issue whether its depreciation rules were preemptive so that it was not accurate to say that New England Telephone sought enforcement of that order (Pet. App. 2b). Furthermore, the court stated, New England Telephone had not made this argument previously, and it "would be unfair to other parties in the case" to accept it on rehearing (*ibid.*).

4. The Louisiana case arose in May 1982, when South Central Bell sought a rate increase that was based in part on application of the FCC's depreciation methods. The Louisiana Public Service Commis-

sion denied the telephone company's request (J.S. App. A99-A101). The Louisiana commission "clearly implied its refusal to implement FCC-prescribed depreciation methods" (*id.* at A10 (footnote omitted)). South Central Bell filed an enforcement action under Section 401(b) in the United States District Court for the Middle District of Louisiana, and that court issued a preliminary injunction ordering the Louisiana commission to permit the telephone company to use the depreciation practices prescribed by the FCC.

The Louisiana commission responded by finding that application of those methods resulted in an increased expense level of $40.5 million. But the Louisiana commission decided, without further proceedings, to reduce the telephone company's rate of return from 13.5% to 12%, so it approved a rate increase of $12.7 million rather than $40.5 million. J.S. App. A10-A11.

The district court then concluded that the Louisiana commission "has not complied with the order of this court" (J.S. App. A55). The court stressed that this commission "received no evidence" before adjusting the rate of return; it instead engaged in "a simple exercise in arithmetic design to minimize the increase in telephone rates" (*ibid.*). The district court modified its injunction by ordering the commission to permit South Central Bell to increase its revenues in order to recover the entire amount the commission had determined was required on account of application of the depreciation practices prescribed by the FCC.

The court of appeals affirmed (J.S. App. A1-A35). It first considered the position adopted by the First Circuit in the Maine case—that the *Preemption Order* is not an "order" under Section 401(b)—and re-

jected it (J.S. App. A17-A23). The court noted that "the First Circuit was not able to cite * * * a single precedent in support of its" narrow interpretation (*id.* at A18). On the contrary, *Ambassador, Inc.* v. *United States*, 325 U.S. 317 (1945), in which the Court assumed that "order" under Section 401 included rulemaking orders, and *Columbia Broadcasting System* v. *United States*, *supra*, in which the Court read "order" under Section 402 to include rulemaking orders, strongly supported the conclusion that the *Preemption Order* is an "order" (J.S. App. A18-A20).

The Fifth Circuit also found the policy justifications underlying the First Circuit's decision unpersuasive. Contrary to the First Circuit, the Fifth Circuit "simply [did] not see how the FCC's responsibility in developing and enforcing a coherent communications policy would be significantly undermined" by reliance on private enforcement of rules (*id.* at A22). Indeed, the court noted that unfairness can result from non-compliance with an administrative rule, and situations exist where only a private party has a sufficient interest to enforce compliance (*id.* at A21-A22). In any event, it also noted, the FCC can "avoid private incursions upon its enforcement responsibilities" by intervening and by filing amicus briefs; and courts may apply the doctrine of primary jurisdiction in order to obtain the FCC's views, when needed (*id.* at A22). Accordingly, the Fifth Circuit held that "the FCC Preemption Order is an order within the meaning of § 401(b)" (*id.* at A23).

The court of appeals also rejected the Louisiana commission's attack on the district court's modified preliminary injunction. Like the district court, the

court of appeals recognized that state commissions have primary authority to set intrastate rates (*id.* at A28). But the court of appeals found that the district court's determination that the Louisiana commission had adjusted the rate of return without further proceedings merely to avoid high telephone rates was not clearly erroneous (*id.* at A30-A31). And the court determined that, since "it is clear that the Preemption Order in prohibiting inconsistent state depreciation practices was intended also to preclude state responses designed to evade the consequences and the purposes of that presumption," the Louisiana commission erred in reducing the rate of return summarily merely to offset increased depreciation expenses (*id.* at A29-A30).

ARGUMENT

In our view, none of the issues raised by these cases warrants the Court's attention. The ultimate issue underlying the disputes between the telephone companies and the state commissions—the validity of the FCC's *Preemption Order*—is not properly presented by any of these cases. That issue is presented by the petitions and jurisdictional statement challenging the Fourth Circuit's affirmance of the FCC's *Preemption Order*. See our Fourth Circuit Opposition. While there is a conflict between the First and Fifth Circuits regarding the type of "order" that may be enforced by private parties under Section 401(b), and while we think that the First Circuit erred in holding that private parties may not enforce orders of the kind involved here, its decision is unlikely to have any important consequences. Nor do we think that the modified preliminary injunction upheld by the Fifth Circuit requires review.

1. None of these three enforcement cases properly presents the issue whether the FCC acted within the scope of its authority in issuing the *Preemption Order*. The Eighth Circuit (Pet. App. A55), the First Circuit (Pet. App. 5a), and the Fifth Circuit (J.S. App. A13) each recognized that, under the Hobbs Act, the Fourth Circuit had exclusive jurisdiction over that issue.[5] That is correct. And, as we argue in our opposition to the Fourth Circuit petitions, that court properly applied settled law in upholding the *Preemption Order*, so there is no need for this Court to review that issue even in the one case that properly presents it—the Fourth Circuit case.

The Arkansas commission nevertheless argues (Pet. 6-19) that the Eighth Circuit should have held the *Preemption Order* ultra vires, and that its refusal to do so is inconsistent with three decisions of this Court, *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973), *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944). But the Arkansas commission is wrong in contending that the Eighth Circuit refused to recognize that courts enforcing orders under Section 401(b) retain equitable power to refuse to enforce those orders. Citing *Hecht Co.* v. *Bowles*, *supra* (Pet. App. A54), the Eighth Circuit held that district courts retain some discretion to refuse to enforce orders under Section 401(b) even when all the statutory requirements for enforcement are met. It instead merely held that, "[u]nder the circumstances of this case, * * * denial of injunctive relief would

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[5] Thus, no error was committed of the sort that occasioned our petition for a writ of certiorari in *ICC* v. *Tri-State Motor Transit Co.*, No. 84-1515 (filed Mar. 25, 1985).

be an abuse of discretion" (Pet. App. A54). In reaching this conclusion, the court of appeals gave particular weight to what it regarded as the Arkansas commission's studied defiance of the FCC's order, even though the state commission could have sought a stay of that order in the Fourth Circuit review proceeding in which it was a party (*ibid.*). Thus, most of the argument in the Arkansas petition misses the mark because the commission has misread the Eighth Circuit's opinion.[6]

2. Despite the conflict in the circuits, we do not think that this Court need consider the issue of what type of "order" may be enforced under Section 401 (b).[7] While, in our view, the First Circuit's decision is erroneous, that decision will probably not have important consequences. In part this is because the First Circuit's holding, as modified on rehearing, should not bar private enforcement actions involving FCC depreciation prescriptions in the future. If we are wrong, the Court may address the issue when a future private enforcement action is barred.

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[6] Moreover, the Fourth Circuit's decision upholding the *Preemption Order*, which followed the Eighth Circuit's decision that the *Preemption Order* cannot be deemed ultra vires, confirms that the Eighth Circuit was correct. Since, in our view, there is no need for this Court to review the Fourth Circuit's decision (see our Fourth Circuit Opposition), which squarely presents the issue of the FCC's preemptive power over depreciation methods, *a fortiori* there is no justification for this Court to consider the issue as presented in the Arkansas case.

[7] The conflict is between the First and the Fifth Circuits. The Arkansas commission did not argue that the *Preemption Order* is not an "order," so the Eighth Circuit did not address the issue.

On the merits, we think the Fifth Circuit has shown that the First Circuit erred in its legal analysis. The First Circuit acknowledged, in its first decision, that its holding necessitated differing interpretations of "order" in Section 401 and Section 402, in light of this Court's decision in *Columbia Broadcasting System* (Pet. App. 11a-12a). In its request for rehearing, New England Telephone noted that the Court in *Ambassador, Inc.* v. *United States, supra*, had assumed that private parties could enforce rulemaking orders. In its supplemental opinion, the First Circuit stated (Pet. App. 2b-3b) that *Ambassador* is distinguishable because it might have involved Section 401(a) rather than Section 401(b), since the Court did not specify which subsection of Section 401 was being construed. But the Fifth Circuit showed that *Ambassador* involved Section 401(b), not Section 401(a). The Fifth Circuit reasoned that, since Section 401(a) authorizes actions to enjoin violation of the Communications Act itself, while Section 401(b) authorizes actions to enforce orders of the FCC, and the suit in *Ambassador* sought to enforce a rule contained in a telephone company tariff, and not to enforce a provision of the Act itself, it must have been brought under Section 401(b) (J.S. App. A18-A19 & n.18).

The First Circuit also erred in its policy analysis. As the Fifth Circuit concluded (J.S. App. A22), federal interests are generally advanced by the availability of private enforcement of FCC orders, including those orders resulting from proceedings similar to those involved in these cases. In cases where that is not so, the agency, by participating as an intervenor or an amicus, and the courts, by invoking the doctrine of primary jurisdiction, can adequately protect federal interests.

But, despite these errors, the First Circuit's decision is not likely to cause harm beyond the loss to the telephone company involved in that case. Its position has not only been rejected by the Fifth Circuit, but by the Fourth Circuit as well (*Chesapeake & Potomac Telephone Co.* v. *Public Service Commission*, 748 F.2d 879 (4th Cir. 1984), petition for cert. pending, No. 84-1362), and we would expect it to be rejected if raised in other circuits. In addition, as the First Circuit itself noted (Pet. App. 3b), private actions seeking enforcement of orders resulting from FCC rulemaking proceedings have been rare. It may be that, after the unusual flurry of litigation resulting from the recent changes in the telephone industry, such actions will again become rare.

In any event, it is not clear to us that the First Circuit's opinion will be troublesome in the future, even in cases brought in that circuit. In its rehearing petition, New England Telephone argued that, even if it could not seek enforcement of the *Preemption Order*, the FCC's *1982 Prescription Order* was specific enough, under the First Circuit's analysis, to qualify as an adjudicative order that it could enforce. The First Circuit gave two reasons for rejecting that argument. One reason, which will not apply in the future, was that it would be unfair to the other parties in the Maine case to permit New England Telephone to raise the argument on rehearing. The other reason was that the *1982 Prescription Order* preceded the *Preemption Order* and "expressly left open the question" whether its prescriptions preempted the states. Starting with the FCC's 1983 *Prescription Order*, however, each depreciation prescription order specifically states that it preempts state rules (see,

e.g., 96 F.C.C.2d at 261-262 n.3). Since the FCC issues depreciation prescription orders for approximately one-third of the nation's major telephone companies each year (*id.* at 260)—after three-way meetings involving the FCC, the telephone company, and a state commission—by the end of this year a depreciation prescription order that expressly states that it has a preemptive effect should be in force for nearly all of the nation's telephone companies. As we read the First Circuit's supplemental opinion, even that Circuit may permit private actions to enforce these prescription orders. Therefore, the issue presented in this case may not arise again, at least not after this year. Since the conflict in the circuits may have no future impact by the time this Court can resolve it, there is no need for review of this issue.[8]

3. The Louisiana commission also contends that the Fifth Circuit erred in upholding the district court's modified preliminary injunction.[9] It char-

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[8] If the Court concludes that it should resolve the conflict between the First and Fifth Circuits on the issue whether the *Preemption Order* is an "order" enforceable under Section 401(b), we submit that it should confine its grant of certiorari to that issue, affirm the Fifth Circuit, and reverse the First Circuit.

[9] The Louisiana commission may not obtain review of this issue by appeal under 28 U.S.C. 1254(2).

First, the injunction at issue is a preliminary injunction. Under *Slaker* v. *O'Connor*, 278 U.S. 188, 189-190 (1929), only "final judgments" are subject to review under Section 1254(2). See *South Carolina Electric & Gas Co.* v. *Flemming*, 351 U.S. 901 (1956). That rule has been questioned (*City of New Orleans* v. *Dukes*, 427 U.S. 297, 301-302 (1976); *City of Chicago* v. *Atchison, T. & S. F. Ry.*, 357 U.S. 77, 82-83 (1958)), but never repudiated. In *Doran* v. *Salem Inn, Inc.*, 422 U.S.

acterizes the district court's action as requiring state commissions to freeze authorized rates of return (J.S. 23). This is simply not so. There is actually

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922, 927 (1975), the Court dismissed an appeal, citing *Slaker*, and noting that the party sought "review of the affirmance of a preliminary injunction." Commentators agree that Section 1254(2), like 28 U.S.C. 1257(2), should be subject to a "final judgment" requirement. 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4037, at 36-39 (1978). In particular, those commentators argue that appellate jurisdiction ought not lie under Section 1254(2) to review "decisions that affirm a preliminary injunction" (*id.* at 38). That position is fortified by this Court's recent statements that statutes authorizing appeals are to be construed narrowly (see, *e.g.*, *Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 7; *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 43 (1983)). A narrow construction leads to retention of the final judgment rule of *Slaker*. Since the Louisiana commission challenges a preliminary injunction, rather than a final order, an appeal is not proper.

Second, the district court did not strike down any state statute (see *Silkwood*, slip op. 7-8); it merely ordered the Louisiana Public Service Commission to obey an injunction requiring it to follow the FCC's prescribed depreciation methods. The Louisiana commission cites two cases, *Atchison, T. & S. F. Ry.* v. *Public Utilities Commission*, 346 U.S. 346 (1953), and *Lake Erie & W.R.R.* v. *State Public Utilities Commission*, 249 U.S. 422 (1919), decided under 28 U.S.C. 1257(2), that held that orders of state commissions were "legislative in nature." To be sure, ratemaking has legislative origins, since in the past some state legislatures set utility rates. In light of the policy that statutes authorizing appeals are to be construed narrowly, these decisions, decided under Section 1257(2), ought not be extended to Section 1254(2). See *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (Puerto Rican statute is not a state statute under Section 1254(2)), and *Torres* v. *Puerto Rico*, 442 U.S. 465, 468 (1979) (appeal lies under Section 1257(2) to review a

very little difference between the parties on any question of importance in the future. The only real issue is whether the Louisiana commission followed the district court's original preliminary injunction. We think that it is clear that the Louisiana commission flouted the court's order, necessitating the modified injunction as a remedial action by the district court to vindicate its own original order.

The Louisiana commission complains (J.S. 21) that "[t]he FCC never suggested that the *Preemption Decision* could bind a state commission to a previously authorized rate of return," implying that the FCC has changed its position. The FCC has not changed its position and agrees with the Louisiana commission that a state commission may adjust its authorized rate of return in light of the adjustment of other factors, including depreciation practices, that affect investor risk. Thus, there is no disagreement that primary authority over intrastate ratemaking lies with state commissions. The FCC's interest is in requiring adoption of depreciation methods that insure accurate allocation of costs so that telephone companies will replace equipment when, in economic reality, it is efficient to do so. The FCC is not in the business of setting intrastate telephone rates.

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decision upholding a Puerto Rican statute). There is no good reason to characterize ratemaking orders as state statutes under Section 1254(2). Unlike statutes, they are not codified and are generally transitory in nature, reflecting changes in economic conditions. Accordingly, this Court should not extend the meaning of "state statute" under Section 1254(2) to include ratemaking orders.

Should the Court disagree with our submission that an appeal does not lie in No. 84-870, it should affirm the judgment for the reasons stated in this brief.

The FCC and the Louisiana commission disagree only on the specific question of whether the state commission's abrupt adjustment of the rate of return in this case was correctly characterized as disobedience to the district court's injunction, rather than as a separate ratemaking decision. We think the Fifth Circuit's opinion makes clear that it was properly found to be the former. The state commission held no hearings and considered no new evidence before adjusting the rate of return (J.S. App A31). It presented its argument that the adjustment was warranted in light of reduced investor risk caused by the change in depreciation practices for the first time in its reply brief in the court of appeals (*ibid.*). In these circumstances, the district court did not abuse its discretion by modifying its injunction so as to effectuate its previous order. In any event, whether, under the peculiar facts of this case, the district court correctly determined that the Louisiana commission was improperly evading compliance with the court's injunction is not a question warranting review by this Court.[10]

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[10] The Louisiana commission's other arguments also do not warrant review by this Court. The Johnson Act, 28 U.S.C. 1342, does not foreclose federal court jurisdiction in this case because jurisdiction is not based on diversity or on a claim that the state's rate order was unconstitutional, but on a federal statute expressly authorizing the district court to act (J.S. App. A33 n.28). There is, finally, no basis for the argument that state commissions are exempt from enforcement actions under Section 401(b) on grounds that they are not "persons." The definition of "persons" in the Act is broad and inclusive (47 U.S.C. 153(i)). No court of appeals has accepted this argument, and thus there is no conflict at that level for this Court to resolve.

CONCLUSION

The Court should dismiss the appeal in No. 84-870 for want of jurisdiction and treat the papers on which that appeal was filed as a petition for a writ of certiorari pursuant to 28 U.S.C. 2103. The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10223